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82-1752
No.

In the Supreme Court of the United States

October Term, 1982

John F. Desris and Leo F. Konrad,
Petitioners,

v.

The City of Kenosha, Wisconsin, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS VIOLATED RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE IN REVERSING THE TRIAL COURT'S DECISION.

2. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT WHETHER TWO GROUPS ARE SIMILARLY SITUATED IS A THRESHOLD QUESTION, THAT WHEN RESOLVED IN THE NEGATIVE, OBVIATES THE NEED TO DETERMINE IF THERE IS A RATIONAL BASIS FOR DIFFERENT TREATMENT.

3. WHETHER THE COURT OF APPEALS SOUGHT TO AVOID THE APPLICATION OF THIS COURT'S DECISION IN *OWEN V. CITY OF INDEPENDENCE*, 455 U.S. 622 (1980) BY APPLYING AN IMPERMISSIBLE STANDARD OF APPELLATE REVIEW AND BY UTILIZING AN ERRONEOUS FRAGMENTATION OF THE RATIONAL BASIS TEST.

PARTIES INVOLVED

The parties involved in this petition are: John F. Desris and Leo F. Konrad, Petitioners; and the City of Kenosha, Wisconsin, Casimir J. Miechowica, Elmer J. Rogan, Robert V. Baker, William S. Pocan, Donald Andreoli, Peter P. Nedweski, George R. Fitchett, Earle G. Scoville, Jesse Kolmos, Frank J. Bennett, John D. Bilotti, John J. Madison, Jr., Donald S. Lambrecht, Michael Baltes, Albert Frank, Alvin G. Hoffman, Gerald F. Bellow, Paul W. Saftig, Peter J. Ziehen, Alfred W. Andreucci, William H. Birkholz, Robert C. Boettcher, Ronald E. Broesch, Ronald L. Johnson, Stephen M. Judella, Michael J. Stancato, Members of the Common Council of the City of Kenosha, Wisconsin; and Wallace E. Burkee, Mayor of the City of Kenosha, Wisconsin, Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, John F. Desris and Leo F. Konrad, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding September 9, 1982, and the rehearing of such, which was denied on January 26, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 687 F.2d 1117. It is set forth in Appendix A.

The Judgment of the Court of Appeals appears as Appendix B.

The Denial of Rehearing appears as Appendix C.

The Opinion of the District Court entered on January 7, 1982, it appears as Appendix D.

The Partial Stipulation of Facts appears as Appendix E.

The Order of the District Court entered on April 1, 1980 appears as Appendix F.

The Statutes, rules and ordinances involved appear as Appendix G.

Excerpts from Plaintiffs' Brief in Support of Motion for Summary Judgment on equal protection claims arising under fourteenth amendment and 42 U.S.C. §1983 appear as Appendix H.

JURISDICTION

The judgment of a Panel of the Court of Appeals for the Seventh Circuit was denied and entered on September 9, 1982. The petition for rehearing was denied on January 26, 1983. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES, RULES AND ORDINANCES INVOLVED

Fed. R. Civ. P. 52(a):

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for

> purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Relevant portions of WIS. STAT. §62.13 (1975) are set forth in Appendix G.

Relevant portions of WIS. STAT. §§41.02 & 41.11 are set forth in Appendix G.

Kenosha, Wisconsin, Ordinance No. 19 (July 2, 1956) appears in Appendix G.

Kenosha, Wisconsin, Ordinance No. 39-74 (May 7, 1974) appears in Appendix G.

Kenosha Fireman's Pension Board, Resolutions dated May 26, 1967 and May 21, 1974 appear in Appendix G.

STATEMENT OF THE CASE

The City of Kenosha, Wisconsin has two pension plans for its firefighters, one covering those firefighters hired before January 1, 1948 and the other covering those hired after that date. The former plan was established pursuant to Wis. Stat. §62.13 (hereinafter "62.13 Plan"), now superseded by §41.60, which mandated that all cities of certain classes, including the City of Kenosha, create a pension fund and that said fund be administered by a city board (the Kenosha Fireman's Pension Board, hereinafter "KFPB") whose members would be the Mayor, Fire Chief, City Clerk, City Comptroller and three firefighters.

In 1947, the Wisconsin Legislature enacted Wis. Stat. §66.90, later codified as Wis. Stat., Chapter 41, and now as Chapter 40, creating a new pension plan, the Wisconsin Retirement Fund (hereinafter "WRF"), and required that all municipal employees participate in this plan. The creation of the WRF, however, did not eliminate the 62.13 Plan. The members of the 62.13 Plan were given the option of joining the WRF or of continuing under the 62.13 Plan (1947 Wis. Stat. §66.901(5)(b)). No firefighter in Kenosha elected to join the WRF and, instead, all elected to retain their coverage under the 62.13 Plan.

While there was initially no mandatory retirement age under the 62.13 Plan, the WRF mandated retirement for all members at age 65 (1947 Wis. Stat. §66.906) unless the municipality elected to exercise its option to extend employment beyond that date. Therefore, when Petitioners John Desris and Leo Konrad were hired on January 15, 1951 at the respective ages of 35 and 34, their pension benefits were provided by the WRF which provided that they could work until age 65.

On July 2, 1956, the Respondent City elected to exercise its option to establish its own mandatory retirement age for WRF employees. On that date, the

Common Council (hereinafter "Council") passed Ordinance No. 19 (1956) which adopted age 65 as the compulsory retirement age for WRF employees. Later, the Wisconsin Legislature set age 60 and, ultimately, age 55 as the "normal" and compulsory retirement age under the WRF for those in the protective occupations (which included firefighters). (1956 Wis. Laws, Chapter 549 (age 60); 1959 Wis. Laws, Chapter 251 (implementation of age 60 delayed until January 1, 1964); 1963 Wis. Laws, Chapter 303 (implementation of age 60 delayed until January 1, 1966); 1967 Wis. Laws, Chapter 355 (set age 55 as compulsory retirement age for protectives effective June 30, 1974 but effective as "normal" retirement age on June 30, 1969)). However, these subsequent changes in Wis. Stat. §66.90 (now codified as Wis. Stat. Chapter 40) were effective only if a municipality did not exercise its option to extend the retirement age. By setting its own retirement age of 65 for WRF employees, the Respondent City *did* exercise its option and, therefore, statutory amendments to §66.90 had no effect on the firemen employed by the City of Kenosha.

Unlike the WRF, the 62.13 Plan initially had no mandatory retirement age. This was true until May 26, 1967 when the KFPB, upon finding that it was desirable to have a consistent retirement age for all firefighters employed by the City of Kenosha, passed a resolution setting age 65 as the compulsory retirement age for 62.13 Plan participants.

Age 65 remained the uniform mandatory retirement age for protectives until May 7, 1974 at which time the Council, over the objections of the older firefighters, bowed to pressure from the younger firefighters and the union and passed Ordinance 39-74 which lowered the compulsory retirement age for WRF protectives from 65 to 60. The purpose of this change was to provide greater promotional opportunities for firefighters by creating a greater turnover in older personnel who generally hold the higher ranking positions. However, the actions taken did not effectuate this purpose. The uncontroverted evidence presented to the Trial Court clearly demonstrated that it

was the §62.13 firefighters who held the higher ranking positions in the Kenosha Fire Department. Furthermore, the undisputed evidence disclosed that during the first five years of the operation (May 7, 1974 - May 7, 1979), the mandatory retirement age of 60 compelled the retirement of only two (2) WRF firefighters, the Petitioners Mr. Desris and Mr. Konrad, whose removal as an Apparatus Operator and Lieutenant could have created a maximum of seven (7) promotions. On the other hand, the application of the same retirement age to members of the §62.13 Plan could have created 102 promotions.

The passage of this ordinance created a disparity between the retirement ages for the WRF and 62.13 Plan protectives. In an attempt to rectify this disparity, James Gerlach, one of the three firefighters on the KFPB, introduced a resolution at the May 21, 1974 meeting of that body to reduce the mandatory retirement age for 62.13 Plan participants to 60 in order to maintain a consistent retirement age for all Kenosha firefighters. This resolution was defeated by a four (4) to three (3) vote with the three firefighters (Gerlach, Inele and Robinson) voting for it and the four city officials (Burkee - Mayor; Blasi - Fire Chief; Rudy - City Comptroller; and Procarione - City Clerk) voting against it.

As a result of this action, the Respondent City maintained two separate compulsory retirement ages for its firefighters—age 60 for those covered by the WRF but age 65 for those covered by the 62.13 Plan. On February 1, 1980, almost six (6) years later, the retirement age for 62.13 protectives was to become age 60 pursuant to Ordinance No. 107-78, passed on December 18, 1978, but this retirement age was never implemented since the Respondent City has rescinded all mandatory retirement ages under both the WRF and 62.13 Plans until December 31, 1980 pursuant to Ordinance No. 2-80 and later to December 31, 1981 pursuant to Ordinance No. 84-80.

On January 1, 1977 Petitioners John F. Desris and Leo F. Konrad were mandatorily retired at the ages of 61 and 60, having obtained 25½ years of service, from their respective positions as Apparatus Operator and Lieutenant due solely to Ordinance No. 39-74. Since that time no other firefighter under either the WRF or the 62.13 Plan has been compulsorily retired at age 60 despite the fact that several have reached and surpassed that age.

Petitioners brought this action in the United States District Court for the Eastern District of Wisconsin under 28 U.S.C. §1343(3) and (4) in order to secure relief under 42 U.S.C. §1983 and 29 U.S.C. §621 *et seq.*, and the due process and equal protection clauses of the fourteenth amendment.

The parties entered into a Partial Stipulation of facts and submitted motions for summary judgment, upon which the trial court rendered a decision in favor of the petitioners, in which it was held that the equal protection clause of the fourteenth amendment had been violated by the establishment of different retirement ages for the two groups of firefighters. On September 9, 1982, the Seventh Circuit Court of Appeals reversed. Petitioners' Petition for Rehearing and Rehearing En Banc was denied on January 26, 1983.

ISSUES

I. THE SEVENTH CIRCUIT COURT OF APPEALS VIOLATED RULE 52(a) IN REVERSING THE TRIAL COURT'S DECISION.

A. WHETHER TWO GROUPS ARE SIMILARLY SITUATED FOR EQUAL PROTECTION ANALYSIS IS A QUESTION OF ULTIMATE FACT FOR THE TRIAL COURT, AND THE SEVENTH CIRCUIT VIOLATED RULE 52 IN REVERSING THE TRIAL COURT'S FINDING ON THIS ISSUE.

In its decision, the Seventh Circuit held that the two groups of firefighters are not similarly situated. The Panel engaged in what amounted to a *de novo* review of the facts, which resulted in the substitution of its view of the facts, both ultimate and subsidiary, for the careful findings of fact by the trial court. In fact, the Panel even supported part of its decision with its own finding of fact that was directly in conflict with a stipulation of the parties.

In its opinion, the trial court found that the firefighters covered by the Wisconsin Retirement Fund (hereinafter "WRF") do not comprise a separate and distinct department apart from the firefighters under the §62.13 Plan; that the WRF firefighters are not subject to a different chain of command than the §62.13 firefighters; that the pension plans do not determine the difference in job duties or responsibilities; and that other than the pensions, salaries, benefits and other indicia of City employment are not determined by the plan by which the firefighters are covered. These findings may be characterized as findings of subsidiary facts. The trial court summed up its review of these facts by finding that there is no substantial difference between the WRF firefighters and the 62.13 firefighters. This can be characterized as an ultimate fact:

> There is nothing in the records or in the arguments of the parties to suggest that there is a substantial difference between the WRF firefighters and the 62.13 firefighters that would cause these concerns to be more appropriate with respect to one group than the other.

In reversing and holding that the two groups are not similarly situated, the Seventh Circuit ignored the mandate of *Pullman-Standard v. Swint*, ___ U.S. ___, 102 S.Ct. 1781 (1982), in which this Court held that findings of ultimate fact are not to be reversed unless clearly erroneous. In *Pullman-Standard*, this Court made it crystal clear that Rule 52(a) of the Federal Rules of Civil Procedure applies to findings of ultimate fact as well as to findings of subsidiary facts:

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

___ U.S. at ___, 102 S.Ct. at 1789.

Although the Seventh Circuit did not specifically admit that it made such a *de novo* review of the trial court's findings of fact on the justification that such *de novo* review is permissible when the lower decision was rendered upon a motion for summary judgment, it obviously did so. In fact, it would simply be following its decision in *Silverstein v. United States*, 419 F.2d 999 (7th Cir. 1969), *cert. den.*, 397 U.S. 1041 (1970), that in a disposition of an action upon a motion for summary judgment, the "clearly erroneous" rule does not apply, since only questions of law are presented.

After this Court's decision in *Pullman-Standard*, there is no question that the exception set forth in *Silverstein* is

no longer good law. Although it is not expressly stated in the majority opinion in *Pullman-Standard*, the evidence presented at the trial court level with regard to the relevant issue which was decided by the Court (whether there was intent to discriminate in the creation of a seniority system), was closely analogous to the documentary evidence presented to the trial court in this action. Justice Marshall stated in his dissent in *Pullman-Standard* that the trial court's findings of fact were "entirely based on documentary evidence." ___ U.S. at ___, 102 S.Ct. at 1796. Therefore, it is implicit in the majority opinion of *Pullman-Standard* that Rule 52(a) does not carve out exceptions to the "clearly erroneous" rule even in "paper cases." Nevertheless, that is precisely what the Seventh Circuit did in the instant case when it substituted its view of the facts for that of the trial court.

A closer examination of this issue reveals that several of the circuit courts of appeals, in addition to the Seventh Circuit, have also held that the standard of appellate review is different for "paper cases." In *Lamb v. Interstate Commerce Commission*, 259 F.2d 358, 360 (10th Cir. 1958), the Tenth Circuit held that it was "in as good a position as the trial judge to evaluate the stipulated facts." In *San Flippo v. United Brotherhood of Carpenters*, 525 F.2d 508 (2d Cir. 1975), the Second Circuit held that it was also in as good a position as the trial court to read and interpret the pleadings and affidavits upon which a decision had been rendered. *Accord, Hadco Products, Inc. v. Walter Kidde and Co.*, 462 F.2d 1265 (3d Cir. 1972), *cert. den.*, 409 U.S. 1023 (1972). It was further stated in *Emmco Insurance Co. v. Wallenius Caribbean Line, S.A.*, 492 F. 2d 508 (5th Cir. 1974) that the trial court's findings, when based upon documentary evidence, are deprived of a degree of finality which would otherwise attach under Rule 52(a).

On the other hand, the Eighth Circuit has not followed this incorrect line of reasoning. In *Worthen Bank and Trust Company v. Franklin Life Insurance Company*, 370 F.2d 97

(8th Cir. 1966) the Eighth Circuit flatly rejected the application of a different standard of appellate review to decisions upon motions for summary judgment. The reasoning of the Eighth Circuit in *Cole v. Neaf*, 334 F.2d 326, 329 (8th Cir. 1964) clearly presaged the implications inherent in *Pullman-Standard*.

> We have repeatedly and consistently held, at least subsequent to the Supreme Court's decision in *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 291, 80 S.Ct. 190, 4 L.Ed.2d 1218, that the clearly erroneous standard applies to reasonable inferences to be drawn from stipulated or undisputed facts and that it is for the trial court rather than this court to draw legitimate and permissible inferences.

The Ninth Circuit has also rejected the position adopted herein by the Seventh Circuit. In *Quon v. Niagara Fire Insurance Co.*, 190 F.2d 257, 260 (9th Cir. 1951), the Ninth Circuit held that the findings of fact by the trial court with regard to stipulations are not subject to more probing appellate review than in other types of cases.

This egregiously improper exercise of appellate review on the part of the Seventh Circuit, which is concurred in by several other courts of appeals, is in direct conflict with *Pullman-Standard v. Swint and Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ____ U.S. ____, ____, 102 S.Ct. 2182, 2189 (1982), wherein this Court again emphasized that the determination of the weight of the evidence is "the special province of the trier of fact." In its decision, the Seventh Circuit ignored the well-established principle that the function of an appellate court is "not to decide factual issues *de novo* . . . ." *Tenth Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969). As this Court recently cautioned in *Inwood Laboratories, supra*,

> *An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another*

> *construction resolve the ambiguities differently, and find a more sinister cast to action which the District Court apparently deemed innocent." United States v. Real Estate Boards*, 339 U.S. 485, 495, 70 S.Ct. 711, 717, 94 L.Ed. 1007(1950).

____ U.S. at ____, 102 S.Ct. at 2190.

What is presented here is an improper usurpation by the Seventh Circuit of the function of the trial court to find subsidiary and ultimate facts. This exercise of appellate review, although sanctioned by various courts of appeals, is in direct conflict with the holdings of the Court.

B. THE SEVENTH CIRCUIT VIOLATED RULE 52 WHEN IT MADE A FINDING OF FACT CONTRARY TO THE STIPULATION OF THE PARTIES IN ORDER TO FIND A RATIONAL BASIS.

An even more incredible example of the Seventh Circuit's eagerness to substitute its view of the facts for that of the trial judge is the Panel's finding of fact that is in direct contradiction to the stipulations entered into between the parties. In its opinion, the Seventh Circuit stated that the Common Council had exercised its authority to extend the WRF retirement age for WRF firefighters from age 55 to age 60. This is absolutely incorrect. Stipulation 13 (agreed to by the parties) clearly states that the retirement age had already been established by the Common Council at 65, and that on May 7, 1974, it voted to reduce the retirement age from age 65 to 60:

> 13. Prior to passage of Ordinance No. 19-56, passed on July 2, 1956, *WRF* protective occupation employees retired at the age of sixty-five (65) pursuant to 66.906(1), Wisconsin Statutes. Ordinance No. 19-56 adopted this mandatory retirement age for all city employees. In 1967 the Wisconsin Legislature, through Chapter 355 Laws of 1967, amended Section 66.901, Wisconsin Statues to provide that after January 30, 1974 the

> normal and conditional retirement age for each protective occupation participant would be fifty-five (55) unless the municipality or local government had exercised its authority to extend the retirement age beyond fifty-five (55) pursuant to Wisconsin Statutes Section 41.11(1) or its predecessor Wisconsin Statutes Section 66.906(b). Ordinance No. 39-74, passed May 7, 1974, *reduced* said mandatory retirement age for *WRF* protective occupation employees to sixty (60). *Said reduction* in the age for mandatory retirement was done as a result of lobbying by union officials and the younger employees affected by the retirement age seeking a *reduced* retirement age. The older employees, however, opposed this *reduction* in the retirement age. One of the purposes of said change was to provide greater promotional opportunities for firefighters by creating a greater turnover in older personnel who generally hold the higher ranking positions. Ordinance No. 107-78, passed December 19, 1978, placed a moratorium on mandatory retirement at age sixty (60) until February 1, 1980. (emphasis supplied)

The significance of this egregious violation of Rule 52 is that the erroneous finding of fact involved, *i.e.*, that the retirement age was increased from 55 to 60, is absolutely necessary to the court's reasoning that there *was* a rational basis for the discrimination.

The Panel also held that there was a rational basis in that the stated purpose of the WRF was "to provide for the payment of annuities and other benefits to employees . . . ." The Panel stated that this purpose, when coupled with the fact that the §62.13 pension plan provides potentially smaller retirement benefits than the WRF plan, provides a reasonable basis for requiring the WRF firefighters to retire earlier than the §62.13 firefighters, because the §62.13 firefighters could thereby more easily provide adequate financial support for themselves and their families.

Petitioners submit that such a rational basis is illusory and is dispelled when the proper constitutional standard is applied. Governmental action complies with the strictures of equal protection only when "it rationally *furthers* a legitimate state purpose." *Zobel v. Williams*, ___ U.S. ___, 72 L.Ed.2d 672, 678 (1982) (emphasis supplied), see also *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). When this test is applied it becomes evident that the City's actions in *reducing* the mandatory retirement age cannot pass constitutional scrutiny because they do not *further* any legitimate state interest.

The Petitioners do not here dispute that the WRF's stated purpose of providing for the payment of annuities and other benefits to its employees is a legitimate purpose. The pivotal issue herein, however, is not whether that purpose is legitimate but whether the City of Kenosha's action in *reducing* the retirement age for its WRF firefighters *furthered* that purpose. Clearly, it did not. While lowering the WRF retirement age did not prohibit the Petitioners from receiving any benefits at all, it did result in those benefits being lower than they would have been had the Petitioners been permitted to retire at age 65. This would have occurred because the WRF calculates benefits on the basis of a percentage of final average pay and this percentage increases with the number of years of service culminating at 80% after approximately 35 years of service. Since the Petitioners were compelled to retire after only 26 years of service, their pension benefits were correspondingly lower than they would have been had they retired at age 65.

Nor did allowing §62.13 firefighters to continue working until age 65 further the purpose articulated by the Seventh Circuit of enabling the §62.13 firefighters to provide adequate financial support for themselves and their dependent families. Unlike the WRF Plan, the benefits of which are calculated on a graduated scale determined by years of service, benefits under the §62.13 Plan are fixed

and inalterable once a firefighter initially qualifies for benefits, regardless of the number of years of service. The §62.13 Plan provides that a firefighter governed by its provisions is entitled to a pension of 50% of his base pay plus the value of his fringe benefits once he reaches age 55 and has 22 years of service. Regardless of how much longer he might serve, unlike the WRF Plan, this formula does not change.

In the final analysis, the critical issue is whether *reducing* the WRF mandatory retirement age from 65 to 60 *rationally furthered* any legitimate state purpose. Clearly it did not *further* the purpose of providing annuities to WRF firefighters. Equally clear is that it did not *further* the provision of adequate financial support for §62.13 firefighters.

C. DE NOVO FACTUAL REVIEW DISCOURAGES CONSERVATION OF JUDICIAL RESOURCES.

Furthermore, such *de novo* appellate review thwarts the very purposes behind Rule 52(a): the efficient adjudication of controversies. In recent years, there has been an increasing concern over the backlog of cases clogging our federal courts. The number of district and circuit judges has been increased substantially in an attempt to stem this ever increasing flood of litigation. In an attempt to conserve our overtaxed judicial resources, arbitration has been suggested, every attempt is made to facilitate settlement, and even magistrates are being impressed to decide issues formerly reserved to district judges. The district courts are pursuing every means to reduce the time spent in trial through close supervision during the pre-trial stages of litigation.

Certainly in light of such an overburdened judiciary, the parties should be encouraged to avoid trials whenever it is possible through the use of stipulations and documentary

evidence, as the parties did in this action. Not only was a trial avoided, but a jury trial at that. Yet, there is little incentive indeed to pursue such alternatives to trial when a prevailing party must face the specter of a *de novo* factual review by the appellate courts.

If such a double standard is to apply, a party will be much better served to demand not only a trial, but a jury trial whenever possible, since an appellate court is necessarily more constrained in so blatantly substituting its judgment for that of the trial court where a trial has been held. Petitioners suggest that such a development is hardly in the best interest of a judicial system already taxed to the limit by an overly litigious society.

This Court should grant this petition and accept this opportunity to clearly define the proper limits of appellate review. Without such clarification by this Court, litigants will be well-advised to insist upon full jury trials upon all issues, with their narrow scope of appellate review, rather than to avail themselves of the efficient means of disposition of issues such as summary judgment, at the risk of being subjected to *de novo* review by the appellate court.

II. THE SEVENTH CIRCUIT ERRED IN HOLDING THAT WHETHER TWO GROUPS ARE SIMILARLY SITUATED IS A THRESHOLD QUESTION THAT WHEN RESOLVED IN THE NEGATIVE OBVIATES THE NEED TO DETERMINE IF THERE IS A RATIONAL BASIS FOR DIFFERENT TREATMENT.

The seventh Circuit premised its opinion upon the initial determination that the two groups of firefighters are not similarly situated, without viewing the issue in the context of the constitutional analysis of which it is a part. The Panel treated the issues of "similarly situated" and "rational basis" as two separate, segregable issues. This improper division of a single constitutional test allowed the Seventh Circuit to review the facts *de novo* and to

substitute its view for that of the trial court, and thus barely avoid the more difficult, but proper question, which is whether the few actual differences between the two groups merits different retirement ages under the equal protection clause of the fourteenth amendment.

After making this difficult leap in logical reasoning, the Seventh Circuit then stated that if it *were* necessary to decide whether a rational basis existed for the disparity in retirement ages, such rational basis did exist, and went on to enumerate the reasons for this rational basis.

This segmented analysis is improper, and is not sanctioned in the Court's decisions. Certainly the issue of whether two groups which are treated differently are similarly situated is a valid question. Nevertheless, it is meaningless unless considered along with all of the surrounding circumstances. It is insufficient to state that two groups are not similarly situated and thereby justify dissimilar treatment. It is imperative that it be shown that the dissimilarity itself creates a rational basis for the distinction between the two groups. Otherwise, it would always be possible to latch upon some kind of dissimilarity, and thereby avoid the more difficult consideration of whether there was any rational basis for the different treatment.

The implications of the Seventh Circuit's holding are disturbing. If courts could avoid whether there was a rational basis for discrimination between two groups by simply finding they were not similarly situated, then the concept of equal protection would be reduced to an empty shell without meaning, since there will always be *some* difference between two groups sufficient to say they are not similar.

Certainly, no one disputes that blacks are not similarly situated to whites in our society. Because of the very denial of the equal protection of the law, blacks have suffered

lesser educational, employment, and other opportunities, all making for marked socioeconomic differences between blacks and whites.

Under the equal protection analysis used by the Seventh Circuit, a court would never get to the issue of whether there was a compelling state interest supporting racial classification, because the equal protection inquiry would cease with a finding that the two groups were not similarly situated.

Perhaps an even better analogy is to gender-based classifications. Again, few would deny that there are significant differences between men and women, socioeconomic and cultural differences, as well as the more obvious physical ones. Yet, this Court has made it clear that such differences do not automatically justify differences in treatment as would the Seventh Circuit's novel analytical approach. It must still be shown that the particular nature of the dissimilarity, in this case gender, itself forms a rational basis for treating the two groups differently.

The Court made this principle clear in *Reed v. Reed*, 404 U.S. 71 (1971), wherein it was held that an Idaho statute, which provided that as between persons equally qualified to administer estates, males must be preferred, violated the fourteenth amendment:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways . . . . The Equal Protection Clause of that amendment does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. (citations omitted)

Id. at 75-76.

A vital portion of this analysis under the equal protection clause of the fourteenth amendment is whether the classification is valid because it has a "fair and substantial relation to the object of the legislation." *Id.* at 76. *Accord, Kahn v. Shevin*, 416 U.S. 351 (1974). In *Tigner v. Texas*, 310 U.S. 141 (1940), this Court certainly did analyze the differences between the two groups afforded different treatment, but did so in conjunction with an analysis of whether these differences were substantial enough to merit different treatment. Hence, the issue of whether the groups are "similarly situated" is not a threshold question which must be decided before reaching the issue of whether there is a rational basis for the difference in treatment. Rather, it is just one possible rational basis for differing treatment provided one can show that the dissimilarity is itself rationally related to the legitimate purpose in question.

Not only was the Seventh Circuit's analysis flawed, but so was its justification for holding that the two groups of firefighters are not similarly situated. The Panel held that the two groups of firefighters are not similarly situated because one group is covered by the §62.13 pension plan, and the other is covered by the WRF. The Panel did, however, admit that the date of *hire* is the sole factor that determines to which of the two pension plans a Kenosha firefighter belongs (except for a choice which was given the §62.13 firefighters when the WRF was established). The Panel based its finding that the two groups are not similarly situated upon three factors:

(1) "The §62.13 plan afforded pensioners the opportunity to select members of the KFPB, and who in turn determined the §62.13 retirement age." This is a distinction without a difference. Under *Owen v. City of Independence*, 455 U.S. 622 (1980), both the KFPB and the Common Council, which chose the WRF retirement age, are agents of the City; both may subject the City to liability for their violations of the law. Further, it was stipulated that the mayor, who voted as a member of the KFPB to keeep

the §62.13 retirement age at 65, failed to exercise his veto power over the ordinance passed by the Common Council to reduce the retirement age for WRF firefighters from 65 to 60. In actuality, the City was directly responsible for the establishment of different retirement ages for its firefighters. This is precisely the type of "interactive behavior" that *Owen* addresses.

(2) "The WRF has potentially greater benefits than the §62.13 plan." Again, this is no indication of a real and substantial difference between the two groups of firefighters. Furthermore, while the WRF Plan may have the potential for greater benefits in the abstract, the effect of the City's decision was to cause the Petitioners' pension benefits to be lower than those provided by the §62.13 Plan. Even more importantly, allowing §62.13 firefighters to continue working until age 65 had no relationship to the pension benefits they would receive since the formula by which their benefits are calculated was fixed and inalterable regardless of whether they retired at 60 or 65. In short, the difference cited by the Panel has no meaning or substance in the context of this case.

(3) "The WRF Plan contains a mandatory retirement age of 60, while the §62.13 members may wait until age 65 to retire." This is a purely boot-strap argument in view of the fact that this lawsuit is *based* upon this discrepancy in retirement age. Under no set of circumstances should the very harm that has been done to the Petitioners be used as a *basis* for the justification of that harm. This argument proves nothing. Further, the retirement ages for the two groups are entirely separate and apart from the pension plans. The retirement ages were both statutorily left up to the discretion of and established by agents of the City.

The Panel also stated in its opinion that the various provisions of each plan cannot be viewed in isolation. Surely this cannot be true; the retirement age is entirely *separable* from the administrative procedure for each plan. Neither

plan required that a particular retirement age be established for the firefighters covered by its terms. Each plan left the establishment of the retirement age up to the discretion of the City. Therefore, the issue of the proper retirement age for firefighters was a separate policy question for the City to decide. And the City in fact did so, through its agents. The State of Wisconsin made the determination as to how pension benefits should be accrued and awarded, but left the mandatory retirement age as a separate issue for the City to decide. In its decision, the Panel surely knew that how one looks at the question predetermines the result: if one only finds that there are two separate pension plans with separate retirement ages, benefits, and procedures, and inquires no further, the outcome is, of course, the same as that reached in the Panel's decision.

But if one looks farther, and views the issue in the proper perspective, the result is also clear: the City of Kenosha, Wisconsin, treats its firefighters unequally by forcing one group to retire at age 60 and another group to retire at age 65. The only basis for this distinction is the entirely fortuitous and unimportant factor of when the firefighters were hired. Other than being covered by a different pension plan, Petitioners are no different in their circumstances than the §62.13 firefighters: they all work in the same department of the City; they perform essentially the same job duties; they possess the same qualifications; they are subject to the same rules and regulations and chain of command; and they are met with the same promotional opportunities as the §62.13 firefighters. The *only* difference between the two groups is in the pension plans, and, as the trial court found, this difference is not great enough to find that the two groups are not similarly situated for purposes of the equal protection clause.

It is undeniable that distinctions beween groups of people must be based on *real* and *substantial* differences. *Zobel v. Williams*, ____ U.S. ____, 72 L.Ed.2d 672 (1982);

Sneed v. Shaffer Oil and Refining Co., 35 F.2d 21 (8th Cir. 1929); *Wisconsin v. Johnson*, 246 N.W.2d 503 (Wis. 1976).

The extremely improper formulation and implementation of the "rational basis test" under the equal protection clause of the fourteenth amendment by the Seventh Circuit in its decision below merits this Court's inquiry.

III. THE SEVENTH CIRCUIT SOUGHT TO AVOID THE APPLICATION OF THIS COURT'S DECISION IN *OWEN V. CITY OF INDEPENDENCE*, 455 U.S. 622 (1980) BY APPLYING AN IMPERMISSIBLE STANDARD OF APPELLATE REVIEW AND BY UTILIZING AN ERRONEOUS FRAGMENTATION OF THE RATIONAL BASIS TEST.

It is apparent that by improperly broadening its standard of appellate review, and by creating a threshold question of "similarly situated" in equal protection "rational basis" analysis, the Seventh Circuit sought to avoid the consequences of this Court's decision in *Owen v. City of Independence*, 455 U.S. 622 (1980). The Seventh Circuit stated that it was unnecessary to reach the issue of whether the action taken by the §62.13 Plan's administering board, the KFPB, could be characterized as official City action. That this tortured reasoning is a blatant attempt to circumvent this Court's holding in *Owen v. City of Independence* is apparent from a reading of the Seventh Circuit's opinion:

> Implied in the district court's opinion is the conclusion that the plaintiffs and §62.13 pension plan firefighters are similarly situated as to the requirement of mandatory retirement because they are all firefighters employed by City of Kenosha. This oversimplified analysis of the circumstances presented in this case ignores the fact that the procedures for setting a date for mandatory retirement are part of two separate and distinct programs with separate and distinct benefits, which differ from each other in at least three important respects.

687 F.2d at 1119.

Although the Seventh Circuit technically based its decision upon its finding that the firefighters are not "similarly situated," the net effect of the decision is a circumvention of the intent and spirit of *Owen*.

In *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), this Court overruled prior decisions and held that local governing entities may be liable under 42 U.S.C. §1983 for "monetary, declaratory, or injunctive relief where, as here the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. That decision recognized that a municipality can only act through its agents. *Owen v. City of Independence, supra* carried *Monell* even farther and stands for the principle that a municipality is not entitled to use the good faith of its officers and agents as a qualified immunity from liability for their official acts under §1983. In reaching its decision, the Court cited with approval the "Thayer principle:"

> [I]f it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done.

Id. at 641.

This Court found no good reason to extend such a qualified immunity to municipalities in view of the

standards of acceptable state action mandated by the United States Constitution:

> [A] municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a §1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and Statutes.

Id. at 649.

Indeed, the rationale for the Court's holding in *Owen* was clearly explained as being one of encouragement to the safeguarding of citizens' constitutional rights:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policy-making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. *Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.*

Id. at 651-52 (emphasis supplied).

It is undeniable that the difference in treatment accorded the Petitioners is the very sort of "systemic"

injury mentioned in the above quoted passage. Nevertheless, the Seventh Circuit stated that it was unnecessary to even reach the issue of whether the action taken by the §62.13 Plan's administering board, the KFPB could be characterized as official city action, because it held that the two groups of firefighters are not similarly situated. This attempt to circumvent and avoid the application of *Owen* to the facts of this case warrants this Court's granting of this Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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82-1752

No.

Office-Supreme Court, U.S.
FILED
APR 26 1983
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

October Term, 1982

John F. Desris and Leo F. Konrad,
Petitioners,

v.

The City of Kenosha, Wisconsin, et al.,
Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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APPENDIX A

No.

In the
Supreme Court of the United States

October Term, 1982

John F. Desris and Leo F. Konrad,
Petitioners,

v.

The City of Kenosha, Wisconsin, et al.,
Respondents.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN.
No. 78-C-832 — Terence T. Evans, *Judge.*

Argued June 4, 1982 — Decided September 9, 1982

Before POSNER and COFFEY, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

COFFEY, *Circuit Judge.* This is an appeal from a Decision and Order of the District Court for the Eastern District of Wisconsin, the Honorable Terence T. Evans, presiding. The decision appealed from granted the plaintiffs' motion for summary judgment holding that the Kenosha City Ordinance No. 39-74 requiring the plaintiff-firefighters to retire from their positions as firefighters at

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*The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

age sixty violated the plaintiffs' right to equal protection of the laws secured under the Fourteenth Amendment to the United States Constitution. We REVERSE.

The firefighters employed by the City of Kenosha participate in one of two separate and distinct pension plans of the City of Kenosha, Wisconsin. Each of the two pension plans was established under the mandates of state law and their provisions are governed by state statutes. One of the two pension plans applies to firefighters hired before January 1, 1948 and was established pursuant to §62.13 Wis. Stats. (hereinafter "§62.13 plan"). [1] The other pension plan, created in 1947 by §66.90 Wis. Stats. (now generally Chapter 41 1979-80Wis. Stats.), covers firefighters hired after January 1, 1948 and is denominated the Wisconsin Retirement Fund ("WRF"). The WRF and the §62.13 plans are separate and distinct pension plans each of which pay separate and distinctly different benefits. The date of hiring is the sole factor which determines which one of the two pension plans a Kenosha firefighter belongs to, except that at the time the WRF plan was created the firefighters participating in the §62.13 plan were given the opportunity to join the WRF plan. No City of Kenosha firefighter participating in the §62.13 plan made the election to join the WRF plan.

The §62.13 plan, pursuant to state statute, was administered by a local board, known as the Kenosha Fireman's Pension Board (K.F.P.B.), whose membership was made up of the Mayor, the Fire Chief, the City Clerk, the City Comptroller, and three firefighters selected by the participating members of the pension plan. [2] The WRF plan

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1

§62-13 Wis. Stats. is now recodified as §41.60 1979-80 Wis. Stats.

2

Administration of the §62.13 plan was transferred to the WRF by Chapter 182 Laws of Wisconsin 1977 and the K.F.P.B. was then discontinued. This change in the administration of the §62.13 plan is not relevant to the facts of this case.

is administered on a state-wide basis by the WRF board under Chapter 41 of the Wisconsin Statutes.

The §62.13 plan initially had no mandatory retirement age but in 1967, the Kenosha Fire Pension Board fixed the mandatory retirement age for §62.13 firefighters at age 65.

The WRF pension plan initially provided by state statute for compulsory retirement at age 65, and later was amended to reduce the age to 60, unless the employer or appointing authority extended the employee's term. In 1967 the Wisconsin Legislature changed the WRF plan to provide that the normal mandatory retirement age for Wisconsin firefighters would be age 55 unless the local government chose to extend that age. Chapter 355 *Laws of Wisconsin 1967.* On May 7, 1974, the Kenosha Common Council, exercised this statutory authority by enacting Ordinance No. 39-74, extending the mandatory retirement age for WRF firefighters from age 55 to age 60.

The plaintiffs were both hired by the City of Kenosha as firefighters on January 15, 1951 and thus are participants in the WRF plan. Pursuant to Kenosha City Ordinance No. 39-74, both plaintiffs were retired on January 1, 1977 as both had attained the age of 60. The plaintiffs subsequently commenced this action under 42 U.S.C. §1983,. the Age Discrimination in Employment Act ("ADEA"), and the Fourteenth Amendment of the United States Constitution against the City of Kenosha, the members of the Kenosha Common Council, and Mayor Wallace E. Burkee, alleging that the plaintiffs were unlawfully forced to retire from their jobs.

The parties to this action agreed to a partial stipulation of facts and subsequently the plaintiffs moved for summary judgment on the ground that their mandatory retirement by the city denied them equal protection of law in violation of the Fourteenth Amendment and 42 U.S.C. §1983, in that firefighters under the §62.13 plan were not subject to

compulsory retirement by the city until age 65 while the plaintiffs were forced to retire at age 60. [3] The defendants also moved for summary judgment on the ground that the retirement of the plaintiffs was lawful under the terms of the ADEA, which permits an employer to retire employees pursuant to the terms of a bona fide pension plan.

The district court granted the plaintiffs' motion for summary judgment holding that the mandatory retirement provision of the WRF pension plan contravened the Equal Protection clause of the Constitution since (1) the action of the K.F.P.B. can be characterized as official city action, and (2) there was no rational basis for the difference in mandatory retirement age existing between the WRF and the §62.13 pension plans. Based upon these holdings, the district court's order awarded the plaintiffs full back pay from the day of their forced retirement to the day of their 65th birthday.

The defendants raise three issues on appeal: (1) whether an equal protection issue can arise where two separate and distinct pension plans administered by separate bodies create disparate dates for mandatory retirement; (2) whether a rational basis exists for the disparate ages for mandatory retirement; and (3) whether there is a basis for an equal protection violation absent a showing of a purposeful and invidious denial of equal protection. We view the defendants' first issue as raising the question of whether the members of the WRF plan and members of the §62.13 plan are in fact similarly situated

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Since the date that this action was initiated, the WRF and the §62.13 pension funds were merged for administrative purposes. See Footnote 2. Part of that merger included a procedural change which permitted the Kenosha Common Council to set a mandatory retirement date for the §62.13 pension plan. Pursuant to this authority, the Kenosha Common Council passed an ordinance which sets a uniform mandatory retirement date for all firefighters at age 60. Ironically, this new uniform date (at least nominally the plaintiffs' goal in this suit) has not been applied by the City of Kenosha pending the outcome of this lawsuit.

within the purview of the Equal Protection clause. Our resolution of this issue disposes of this appeal.

Issue: Are the plaintiffs, as members of the WRF pension plan, similarly situated with firefighters governed by the §62.13 pension plan and thus entitled to equal protection of the law?

It is axiomatic that the Equal Protection clause of the Fourteenth Amendment only guarantees like treatment to persons similarly situated. As most recently pointed out by the Supreme Court:

> "The Constitution requires that Congress [here the City of Kenosha] treat similarly situated persons similarly, not that it engage in gestures of superficial equality."

Rostker v. Goldberg, 453 U.S. 57, 79 (1981). Similarly, Justice Frankfurter in *Tigner v. Texas*, 310 U.S. 141, 147 (1940) instructed:

> "The equality to which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."

See also Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 469 (1980) (Stewart, J., concurring) ("The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born.") and *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) ("The Constitution does not require things which are different in

fact . . . to be treated in law as though they were the same'. Hence, legislation may impose burdens upon defined classes in order to achieve permissible ends.")

Thus the threshold question presented in this case is whether the plaintiff-firefighters retired under the WRF pension plan are similarly situated with firefighters under the §62.13 pension plan for the purpose of an equal protection challenge to the mandatory retirement age contained in the WRF plan. Implied in the district court's opinion is the conclusion that the plaintiffs and §62.13 pension plan firefighters are similarly situated as to the requirement of mandatory retirement because they are all firefighters employed by City of Kenosha. This over-simplified analysis of the circumstances presented in this case ignores the fact that the procedures for setting a date for mandatory retirement are part of two separate and distinct programs with separate and distinct benefits, which differ from each other in at least three important

respects.[4] First, the §62.13 pension plan afforded the pensioners the opportunity to select members of the K.F.P.B. which governed the pension plan and who in turn determined the date of mandatory retirement. The Kenosha WRF plan's mandatory retirement age, on the other hand, was determined by the Kenosha Common Council acting within the guidelines of Chapter 41 of the Wisconsin Statutes; a firefighter in the WRF plan has only the same right as any member of the Kenosha electorate to determine who sits on the Common Council. Second, the WRF pension plan provides for potentially greater financial

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[4] Paragraphs 26 through 28 of the parties' Partial Stipulation of Facts set forth the following distinctions in the benefits afforded under each pension plan.

> "*26. WRF* members cannot obtain benefits, including Social Security, in excess of 80% of the average of their highest annual salaries for any three years of eligible employment. At approximately 35 years of employement *WRF* protective occupation employees will reach this 80% limitation. Once said employees reach that limitation, they can gain in fund benefits only through an increase in their base salary and not through a percentage increase based upon years of employment.
>
> 27. Generally, *WRF* protective occupation employees have the capacity to receive higher monthly annuities and their spouses to receive higher survivor monthly annuities than do *s. 62.13 Fund* employees.
>
> 28. S. *62.13 Fund* employees receive 50% of their salary plus the value of certain fringe benefits at the level of their last month of employment as retirement benefits. This method of computing benefits did not change under Chapter 182, Laws of 1977, effective March 31, 1978 when the *s. 62.13 Fund* was merged for administrative purposes only into the *WRF*. An increased number of years of service did not procure greater benefits for *s. 62.13 Fund* employees except as to the fact that any increases in base pay would be reflected in the amount of pension benefits. The *s. 62.13 Fund* provides that a member *may* retire with 22 years service at age fifty-five (55)."

benefits than the §62.13 plan; WRF pensioners may receive up to eighty percent of their previous salary while the §62.13 pensioners receive fifty percent of their former salary. Third, the Kenosha WRF plan contains a mandatory retirement age of sixty, while §62.13 members may wait until age sixty-five to retire.

"The various provisions of each plan cannot be viewed in isolation because each provision is intimately tied to the other provisions of the same plan all of which are designed to ensure that the respective pension funds remain fiscally sound. Thus, when the mandatory retirement ages contained in each of the separate and distinct pension plans are viewed in the context of all the rights and obligations conferred under each pension plan, it is clear that the plaintiffs, members of the WRF pension plan, are not similarly situated with §62.13 pensioners.

The plaintiffs, as members of the WRF plan, receive benefits under their pension plan not conferred on the §62.13 pensioners and vice versa. (e.g., the higher benefits under the WRF plan and the higher retirement age contained in the §62.13 plan). Simply stated, the plaintiffs claim that they are entitled to retire at the same age as §62.13 pensioners but at the higher WRF benefit level. The plaintiffs' claim of entitlement to one beneficial portion or aspect of the §62.13 pension plan is not a claim for equal protection of the law but rather more properly should be designated as a claim for greater protection under the law.

The plaintiffs' claims based upon the unequal treatment afforded firefighters under the two distinct pension plans might be interpreted as challenging the constitutionality of the state's decision to replace the §62.13 pension plan with the WRF. The plaintiffs, however, have expressly denied that they challenge the constitutionality of the state's decision to require that firefighters hired after

January 1, 1948 be covered under the WRF. [5] Indeed, since the plaintiffs are entitled to potentially greater benefits under the WRF pension plan, it would obviously be against the plaintiffs' interest to argue that the WRF plan was unconstitutional.

The mandatory retirement date applied by the City of Kenosha in retiring the plaintiffs was established according to the procedures of the WRF, a pension plan established by state law affording the plaintiffs certain rights, benefits and obligations. The mandatory retirement date for Kenosha firefighters covered by the §62.13 plan was established according to procedures of that statutorily mandated plan that provides plan participants different benefits and obligations from those conferred by the WRF pension plan. Since the plaintiffs receive different benefits and bear different obligations under their pension plan they are not similarly situated with the §62.13 pensioners regarding one specific benefit of the §62.13 plan, the age of mandatory retirement requirement and thus have not presented a claim under the Equal Protection clause of the Fourteenth Amendment. [6]

Our determination that, for the purpose of a claim based on the Equal Protection clause, the plaintiffs are not similarly situated with firefighters belonging to the §62.13

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The plaintiffs state in their brief at page 31:

> "Whether the State's decision to replace §62.13 pension plans with the WRF was rationally related to a legitimate State interest is not at issue in this case."

6
Because of the manner in which we have resolved this issue it is unnecessary to address the question of whether the City of Kenosha was responsible for the acts of the K.F.P.B. We believe that that issue arises because in fact the plaintiffs are not similarly situated with the §62.13 pensioners and their retirement benefit rights are determined differently.

pension plan makes it unnecessary for us to determine whether a rational basis exists for retiring WRF pension plan members at age 60 and retiring §62.13 pension plan members at age 65. However, were it necessary to decide this issue we would determine that a rational basis does exist for this disparity in age of mandatory retirement. The plaintiffs and the district court assert that the principal justifications for the mandatory retirement dates are (1) to ensure a physically and mentally fit work force and (2) to facilitate the predictable promotion of younger employees. This position fails to consider the mandatory retirement regulation in the context of the purposes of a pension plan. Section 41.01 1979-80 Wisconsin Statutes recites the purpose of the Wisconsin Retirement Fund.

> "41.01 Wisconsin retirement fund.
>
> (1) PURPOSE. The purpose of this fund is to *provide for the payment of annuities and other benefits to employes* and to beneficiaries of employes of the state of Wisconsin and other public employers in the state, *thereby enabling such employes to provide for themselves and their dependents in case of old age, disability and death,* and thereby effecting *economy and efficiency in the public service by furnishing an orderly means whereby employes who become aged or otherwise incapacitated may, without hardship or prejudice, be retired from active service.*" (Emphasis added)

When this purpose is applied to the question of the appropriate age for mandatory retirement we believe it was reasonable for the K.F.P.B. to have determined that, since the §62.13 pension plan provides potentially smaller retirement benefits than the WRF plan, it furthered the state's interest to allow §62.13 firefighters to work until age sixty-five, if they so desired, and thus enable these §62.13 firefighters to provide adequate financial support for themselves and their dependent families. The WRF firefighters, on the other hand, receive more generous

retirement benefits and thus can more easily provide for themselves and their dependent families when required to retire at age sixty.

The Decision and Order of the District Court is REVERSED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Opinion by Judge Coffey

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 9, 1982

Before
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

JOHN F. DESRIS and LEO F. KONRAD, Plaintiffs-Appellees,	)	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 78-C-832 Judge Terence T. Evans.
No. 82-1178	)	
vs.	)	
THE CITY OF KENOSHA, WISCONSIN, et al., Defendants-Appellants.	)	

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

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*The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 26, 1983

Before
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. WILLIAM J. CAMPBELL, Senior District Judge*

JOHN F. DESRIS and LEO F. KONRAD, Plaintiffs-Appellees,	)	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 78-C-832 Judge Terence T. Evans. *Judge.*
No. 82-1178	)	
vs.	)	
THE CITY OF KENOSHA, WISCONSIN, et al., Defendants-Appellants.	)	

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiffs-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOHN F. DESRIS and
LEO F. KONRAD,
Plaintiffs,

v.

Civil Action
No. 78-C-832

THE CITY OF KENOSHA, WISCONSIN; CASIMIR J. MIECHOWICZ; ELMER J. ROGAN; ROBERT V. BAKER; WILLIAM S. POCAN; DONALD ANDREOLI; PETER P. NEDWESKI; GEORGE R. FITCHETT; EARLE G. SCOVILLE; JESSE KOLMOS; FRANK J. BENNETT; JOHN D. BILOTTI; JOHN R. MADISON, JR.; DONALD S. LAMBRECHT; MICHAEL BALTES; ALBERT FRANK; ALVIN G. HOFFMAN; GERALD F. BELLOW; PAUL W. SAFTIG; PETER J. ZEIHEN; ALFRED W. ANDREUCCI; WILLIAM H. BIRKHOLZ; ROBERT C. BOETTCHER; RONALD E. BROESCH; RONALD L. JOHNSON; STEPHEN M. JUDELLA; MICHAEL J. STANCATO; MEMBERS OF THE COMMON COUNCIL OF THE CITY OF KENOSHA, WISCONSIN; and WALLACE E. BURKEE,

Defendants.

DECISION and ORDER

The plaintiffs, formerly firefighters for the defendant City of Kenosha, commenced this action under 42 U.S.C. §1983, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621,*et seq.*, and the Fourteenth Amendment, alleging that they were unlawfully forced to retire from their jobs. They seek reinstatement, back pay and damages,

The matter is before the court on a partial stipulation of facts and cross motions for summary judgment.

The City of Kenosha had, during the time material to this lawsuit, two pension plans for its firefighters. One plan, codified for many years under §62-13, Wis. Stats., and now codified at §41.60, Wis. Stats. (1979-80) (hereinafter denominated the 62.13 plan) covers firefighters hired before January 1, 1948, and the other, created in 1947 by §66.90, Wis. Stats. (now generally Ch. 41, Wis. Stats.), and denominated Wisconsin Retirement Fund (WRF), covers firefighters hired after January 1, 1948. The plans are different, with each having its own individual characteristics.

The 62.13 plan was administered by the Kenosha Firemen's Pension Board (KFPB), which, by statute, included the Mayor, Fire Chief, City Comptroller, City Clerk, and three subordinates of the City Fire Department. Sections 62.13(9)(b) and 62.13 (10) (a). Wis. Stats. (1921)*. The WRF, with certain exceptions, is administered by the WRF Board under Ch. 41, Wis. Stats. When the WRF plan was created, members of the existing 62.13 plan were given the option to join the new plan, but no firefighters exercised that option. During the time period relevant to this lawsuit, there were approximately 20 firefighters under the 62.13 plan and 125 under the WRF plan. The plaintiffs, both hired as city firefighters on January 15, 1951, were covered by the WRF plan.

The WRF plan initially provided for compulsory retirement at age 65, and later at age 60, unless the employer or appointing authority extended the employee's term. In 1967, the Wisconsin Legislature changed the WRF plan to provide that, effective January 30, 1974, the normal retirement age for protective occupation employees (in

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*Administration of the 62.13 plan was transferred to the WRF byCh. 182, L. 1977, and the KFPB was discontinued.

which group firefighters are included) would be age 55, unless the local government had chosen to extend that age. Ch. 355, L. 1967. Pursuant to its statutory authority to alter the normal retirement age for WRF protective employees, the Kenosha Common Council passed Ordinance No. 39-74 on May 7, 1974, setting the compulsory retirement date for WRF firefighters at age 60. The 62.13 plan initially contained no mandatory retirement age. By resolution adopted May 26, 1967, however, the KFPB fixed the mandatory retirement age of 62.13 firefighters at age 65. Therefore, when Desris and Konrad were retired by the city on January 1, 1977, at ages 61 and 60 respectively, the compulsory retirement age for Kenosha firefighters under the WRF, as were the plaintiffs, was 60, and for those under the 62.13 plan, 65.

The plaintiffs have moved for summary judgment on the ground that their retirement by the city denied them equal protection of law in violation of the Fourteenth Amendment and 42 U.S.C. §1983, in that other firefighters, namely those under the 62.13 plan, were not subject to compulsory retirement by the city until age 65 while they were forced to retire at an earlier age. The defendants have moved for summary judgment on the ground that the retirement of the plaintiffs was lawful under the terms of the ADEA, which permits an employer to retire employees pursuant to the terms of a bona fide pension plan. The plaintiffs oppose this motion by way of a cross motion for summary judgment on the ground that their retirement was unlawful under the ADEA because the pension plan by whose terms they were retired was a subterfuge to evade the ADEA.

The parties are in agreement that this matter should be analyzed under the "rational basis" model of equal protection analysis. See *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976). Under this standard, a classification " 'must be reasonable, not arbitrary, and must rest upon some

ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.' " *Johnson v. Robison*, 415 U.S. 361, 374-375 (1974), quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). This deferential standard of review allows a classification to stand "if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). The plaintiffs argue that the defendants, by maintaining two separate retirement systems with two different mandatory retirement ages, have created an irrational classification of firefighters. The result, they claim, is that firefighters are treated unequally without any rational justification.

As a preliminary matter, the defendants argue that there exists no equal protection issue at all here, inasmuch as the defendants were only responsible for setting the mandatory retirement age for the WRF plan and not for the 62.13 plan, which was governed by what the defendants claim was an autonomous body – the KFPB. Stated in more practical terms, the defendants maintain that they have given equal treatment to all firefighters subject to their authority, but that they were simply not responsible for, nor did they have any control over, the retirement policies of the KFPB. In support of this argument the defendants cite *Martin v. Tamaki*, 607 F.2d 307 (9th Cir. 1979).

In *Martin*, a city Department of Water & Power (DWP) employee who was involuntarily retired at age 65 commenced a §1983 action against the city alleging, among other things, that because all other city employees were subject to compulsory retirement at age 70, the DWP's application of its age 65 compulsory retirement policy denied him equal protection of law. The court concluded that no equal protection question was presented because the DWP, under whose authority the plaintiff was retired, was a separate and distinct entity from the city itself:

> "The DWP is a municipally-owned public utility that provides the City of Los Angeles and several other communities with water and electricity. The DWP is treated as a separate entity under the city charter, and operates independently under the management of a Board of Commissioners. As a result, the DWP provides its employees with terms and conditions of employment that are generally different from those departments that are under the direct control of the City Council.
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> * * * *
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> ". . . Apparently, all city employees, including DWP employees, are hired through a Personnel Department which sets up job classifications and the duties and responsibilities associated with a particular job. However, the DWP differs from other city departments in significant respects. The DWP operates, through its own governing body, independently of other departments. It establishes the terms and conditions of employment for its employees, and as a result, DWP employees have different salary schedules and fringe benefits, including their own retirement, disability, and death benefit plans. Because of these distinctions, it is possible to view the DWP and other city departments as autonomous and independent entities, thereby providing no basis for an equal protection analysis." 607 F.2d at 308, 310.

Substantial differences exist between the facts in *Martin* and those in the instant case. Whereas the DWP in *Martin* constituted a separately recognized entity in the city charter, the firefighters covered by the WRF do not comprise a separate and distinct department apart from the firefighters under the 62.13 plan; they are all firefighters for the City of Kenosha. Nor are the WRF firefighters subject to a different chain of command than the 62.13 firefighters, and those under one plan do not, because of that fact alone, have any different duties or responsibilities. Finally, except for differences in the terms of the pension

plans themselves, the salaries, benefits and other indicia of city employment are not contingent upon whether a firefighter is covered by WRF or the 62.13 plan.

The liability of a governmental entity under §1983 rests upon whether the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 695 (1978). See also: *Salinas v. Breier*, 517 F. Supp. 1272, 1276 (1981). A city, like any other governmental entity, can act only by and through its officials and agents, whether they be legislators, mayors, police chiefs, boards and commissions, or others. Thus, the existence of an equal protection issue arising from governmental action depends upon whether the action was taken by one "whose edicts or acts may fairly be said to represent official policy." *Monell, supra.* In this case, the alleged governmental action is the setting of two different mandatory retirement ages for city of Kenosha firefighters. The parties have stipulated that the mandatory retirement age for WRF firefighters was established by city ordinance. There is no suggestion that this action is not official city action. The question is whether the action of the KFPB in setting its retirement age at 65 can be so characterized.

Section 62.13(10)(a), Wis. Stats. (1921), the first appearance in the state statutes of a firefighters' pension provision, stated that *"Each city* of the second and third class having a paid fire department *shall* have a firemen's pension fund." (Emphasis added.) That provision, it should be noted, was found in the section dealing with general municipal charter law, and it would appear that the fund, or at least the creation of it, is the responsibility of the city. The Board of Trustees to which the administration of the fund was entrusted is composed of seven individuals, four of whom are identified by statute as city officials. Section 62.13(9)(b)1.; 62.09(1), Wis. Stats. The members of the KFPB, as previously mentioned, include the Mayor, City Clerk,

City Comptroller and Fire Chief, as well as three subordinates. The first four of these individuals were board members by virtue of their official positions, while the remaining three were subject to annual elections under the statute. In view of these characteristics of the 62.13 board, I conclude that when it established a mandatory retirement age for firefighters covered under the 62.13 plan, it declared the City of Kenosha's official policy. It makes little sense to say that the decision was not an official action of the defendant City because it was not taken by the City Council or the Mayor individually; those entities were not authorized to do so. But the 62.13 board was so authorized, and when the KFPB established its retirement policy, it was an action by an entity "whose edicts or acts may fairly be said to represent official policy" of the defendant City in the area in which it was empowered by statute to act. Accordingly, an equal protection issue exists. The defendant city, albeit by different official actors, adopted two different mandatory retirement ages with respect to city firefighters. It therefore becomes necessary to apply the *Murgia* equal protection analysis, and *Martin* is not an impediment to the review.

The plaintiffs argue that even under the most deferential standard of equal protection analysis, the disparate treatment of firefighters in the two pension plans cannot be justified. The defendants, however, proffer a number of justifications for mandatory retirement ages:

> "1) To assure a physically and mentally fit work force.
>
> "2) 'To create predictable promotion opportunities and thus spur morale and stimulate superior performance in the ranks.'
>
> "3) '... by removing ... those who are sufficiently old that may be less equipped or less ready than younger persons.'

"4) Open up employment opportunities for younger employees and minorities.

"5) Bring in younger employees with fresh ideas and techniques.

"6) Stimulate performance among younger employees by assuring a predictable number of available positions.

"7) Allow employers to plan in advance for staffing needs.

"8) To avoid the difficulties inherent in evaluating the individual performances of employees over a given age."

Further, the defendants note that the parties have stipulated that one of the city's purposes in adopting 60 as the retirement age for WRF firefighters was to provide promotional opportunities for younger firefighters. As a result, the defendants argue, there is clearly a rational basis for the selection of the WRF mandatory retirement age, and thus the plaintiffs' equal protection claim must fail.

The defendants are correct in their general position with regard to mandatory retirement ages. The U.S. Supreme Court, in two recent decisions, found that mandatory retirement ages for state troopers and federal foreign service personnel did not offend equal protection notions because there existed rational bases upon which the retirement age classifications—as opposed to those under that age—could be justified. *Murgia, supra; Bradley, supra.* But those cases do not squarely address the question in this case. The question here is not whether there is a rational basis for causing city firefighters to retire at age 60; were that so, the *Murgia* and *Bradley* decisions would unquestionably control. The issue is whether there is a rational basis for causing the WRF firefighters to retire at age 60 while the 62.13 firefighters were permitted to work

until age 65. The defendants proffered justifications must, then, be viewed in light of the real classification in issue.

The idea that earlier retirement will provide promotional opportunities for younger employees can hardly be doubted; but that cannot justify early retirement of a group of firefighters who, as a rule, have not been with the department as long as those who are not subject to that same earlier retirement age. Assuming that the possible justifications for early retirement of protective service personnel are all legitimate state interests, I am at a loss to find any rational basis for the defendants' pursuing these interests with respect to the WRF firefighters but not the 62.13 firefighters. There is nothing in the record or in the arguments of the parties to suggest that there is a substantial difference between the WRF firefighters and the 62.13 firefighters that would cause these concerns to be more appropriate with respect to one group than the other.

Nor can I justify the classification in issue here under the reasoning of the court in *Bradley*. There the court upheld against a Fifth Amendment equal protection attack the mandatory retirement at age 60 of Foreign Service employees, while other Civil Service employees, some of whom were involved in similar foreign service duties, were subject to mandatory retirement at age 70. The court justified the differing treatment of the Foreign Service personnel by observing that "if Congress attached special importance to high performance in these positions, which it seems to us it did, it was quite rational to avoid risks connected with having older employees in the Foreign Service but to tolerate those risks in the Civil Service." *Id.* at 106. The court continued:

> "... Even accepting the District Court's judgment that some Civil Service employees serve in foreign posts under conditions as trying as those faced by Foreign Service officers, the latter are trained for and experienced at performing tasks in the Foreign Service;

> they are not freely interchangeable with Civil Service employees. It would thus appear sensible that the Government would take steps to assure itself that not just some, but *all* members of the Service have the capability of rendering superior performance and satisfying all of the conditions of the Service.
>
> "The same is not true of the Civil Service. Only approximately 5% of these employees serve overseas at any one time, and foreign duty is in the main a voluntary matter. We are unwilling to hold that if Congress deems early retirement a useful device to maintain the quality of the Foreign Service it may nevertheless not adopt it without insisting on the same retirement age for all Civil Service employees or at least for those Civil Service employees who choose to seek a career in overseas service. In order to staff the overseas Civil Service positions with sufficiently competent persons Congress obviously has not thought it useful to provide for retirement at age 60. At least to date, its judgment has been otherwise with respect to the Foreign Service, and that judgment is not invalid as a denial of equal protection." *Id.*, 107-108.

Thus, the fact that the Foreign Service retirement rule was both underinclusive, in that it did not encompass Civil Service personnel serving in similar capacities, and overinclusive, in that it forced early retirement of some individuals who were no doubt still capable of performing to desired standards, was not sufficient to invalidate the rule on equal protection grounds. But the reason why the court did not require perfection or "mathematical nicety" in drawing the classification lines was intimately tied to the peculiar features and characteristics of Foreign Service employment, as opposed to Civil Service employment, which justified treating those employees, as a class, separately.

Here, I cannot see any unique or particular features of WRF firefighters, as opposed to 62.13 firefighters, which would justify a mandatory retirement rule so under-

inclusive as to apply only to the former. The 62.13 firefighters are not analogous to the Civil Service personnel in *Bradley* who, with some exceptions, generally were not considered to require retirement at the same age as Foreign Service personnel. Similarly, the WRF firefighters are not analogous to the Foreign Service personnel in *Bradley* who, because of the distinctive nature of their responsibilities, were subject to retirement at an earlier age. The difficulty of finding a rational basis for treating these two groups of firefighters differently is exemplified in the defendants' argument that "time" itself is a rational justification for the different retirement ages. In essence, this argument seems to be that because the 62.13 plan was a pre-1948 plan, while the WRF plan was post-1948, that is reason enough to retire one group at a different age than the other. I see nothing about firefighters hired before 1948 that makes them more suited to retirement at age 65 instead of age 60, and conversely, nothing about those hired after 1948 that makes them more suited to retirement at age 60 instead of 65.

As I am bound to do, I have searched for some imaginable set of facts upon which the present classification could be justified, and finding none, conclude that the defendants' different compulsory retirement ages for WRF and 62.13 firefighters virtually defies rational explanation and therefore cannot pass muster under even the most deferential equal protection standard. The plaintiffs, in being forced to retire at age 60 while their 62.13 brothers were permitted to work until age 65, were denied equal protection of law under the Fourteenth Amendment and 42 U.S.C. §1983 and are entitled to summary judgment.

A question remains regarding the proper relief to which the plaintiffs are entitled. In their amended complaint, filed December 29, 1978, plaintiffs seek reinstatement, back pay to the present, as well as damages. Reinstatement, at this date, would not be appropriate since the plaintiffs have already turned 65 and the city, upon their sixty-fifth birthdays, could have forced them to retire

without violating the equal protection clause. Similarly, the plaintiffs' entitlement to back pay should only span the period in which the defendants' unlawful actions caused them injury. Therefore, I am of the opinion that plaintiff Desris is entitled to back pay from the date of his forced retirement on January 1, 1977 until the date of his 65th birthday, on April 15, 1980, and Konrad is entitled to back pay from January 1, 1977 until the date of his 65th birthday, February 20, 1981. Any earnings from other employment or unemployment benefits received during the periods may be set off against the city's liability.

Furthermore, the City of Kenosha is the only defendant liable for damages. The other defendants were acting as mere agents carrying out the official acts of the city.

Because I further conclude that the city did not wilfully violate the plaintiffs' rights, the remedies afforded under this decision moot claims made under the ADEA. For this reason, they will not be discussed.

IT IS ORDERED that the plaintiffs' motion for summary judgment on their equal protection and 42 U.S.C. §1983 claim be granted.

IT IS FURTHER ORDERED that the parties' motions for summary judgment under the ADEA are dismissed as moot.

IT IS FURTHER ORDERED that the defendants pay the plaintiff Desris back pay from January 1, 1977 until April 15, 1980, plus an amount in damages as will reflect the difference between the amount he currently receives as a monthly pension and the amount he would currently be receiving had he worked as a firefighter for the defendant city until April 15, 1980.

IT IS FURTHER ORDERED that the defendants pay the plaintiff Konrad back pay from January 1, 1977 until

February 20, 1981, plus an amount as will reflect the difference between the amount he currently receives as a monthly pension and the amount he would be currently receiving had he continued in the defendants' employ until February 20, 1981.

IT IS FURTHER ORDERED that all amounts be subject to appropriate setoffs.

IT IS FURTHER ORDERED that the parties attempt to reach agreement as to the proper amounts in the foregoing orders and submit to the court, within 60 days of the date of this order, a stipulation and agreement with respect to the amounts owed or, if agreement cannot be reached, sufficient evidence to permit the court to calculate the proper amounts. If agreement is not reached, a conference with the court to consider the issue is set for March 5, 1982, at 9:00 a.m.

Dated at Milwaukee, Wisconsin, this 7 day of January, 1982.

BY THE COURT:

/s/ Terence Evans

TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF WISCONSIN

John F. Desris and Leo F. Konrad,	)	
Plaintiffs,	)	Partial Stipulation
VS.	)	Of Facts
The City of Kenosha, Wisconsin; et al.,	)	File No. 78-C-832
Defendants.	)	

The above parties, by and through their undersigned attorneys, herein and hereby stipulate as follows:

1. John F. Desris was born on April 22, 1915. He was appointed to the position of "Firefighter" for the City of Kenosha Fire Department on January 15, 1951. The past position which he held prior to retirement was "Apparatus Operator". He retired on January 1, 1977.

2. Leo F. Konrad was born on February 20, 1916. He was appointed to the position of "Firefighter" for the City of Kenosha Fire Department on January 15, 1951. The last position which he held prior to retirement was "Lieutenant". He retired on January 1, 1977.

3. The members of the City of Kenosha Fire Department belong to two separate and distinct pension plans. Twelve (12) active employees as of this date, hired before January 1, 1948, are members of the pension plan established pursuant to Section 62.13, Wisconsin Statutes, hereinafter referred to as the "*s. 62.13 Fund*". Persons hired after 1/1/48 are all members of the Wisconsin Retirement Fund, hereinafter referred to as "*WRF*", pursuant to Chapter 41, Wisconsin Statutes, formerly Section 66.90, Wisconsin Statutes.

4. On or about January 1, 1948, members of the *s. 62.13 Fund* were provided an option to remain therein, or to become members of the *WRF*. No s. 62.13 firefighters elected to join the *WRF*.

5. Plaintiffs John F. Desris and Leo F. Konrad are both members of the *WRF*.

6. At the time of the Plaintiff's retirement, *s. 62.13 Fund* members were retired by the City of Kenosha Firemen's Pension Board, hereinafter known as the "*KFPB*", and not by the mandate or any ordinance or resolution of the Common Council.

7. Plaintiffs were mandatorily retired by Ordinance No. 39-74, effective in May of 1974, copy attached as Exhibit "A" and incorporated herein by reference, upon reaching the age of sixty (60) years and having 25½ years of service.

8. On March 31, 1978, Chapter 182—Laws of 1977, placed the *s. 62.13 Fund* under the administration of the *WRF*, though its individual identity was kept intact and the law governing its operation did not change. This law did away with the *KFPB* and the *WRF* assumed its responsibilities. However, the law was not clear as to who had authority to retire *s. 62.13 Fund* members. The *WRF* arguably could have had this responsibility. The *WRF* refused to accept this responsibility contending that mandatory retirement was an issue of local concern and regulation. The City of Kenosha, in response to this position, adopted Ordinance No. 107-78 in December of 1978, a copy of which is attached hereto as Exhibit "B" and incorporated herein by reference. Said ordinance set a uniform mandatory retirement date of age sixty (60) for all City employees engaged in the protective occupations, including members of the City Fire Department covered by the *s. 62.13 Fund. This ordinance was scheduled to be effective February 1, 1980. However, due to uncertainty in the Age Discrimination in Employment Law, as it is ap-*

plied to protective occupations, Ordinance No. 107-78 was postponed as to its effective date until December 31, 1980 by its amendment through Ordinance No. 2-80 and to December 31, 1981 by Ordinance No. 84-80. Effective January 1, 1982, unless further action of the City governing body is forthcoming, there will be a uniform mandatory retirement age of sixty (60) for City employees in the protective occupations irrespective of which pension plan they are under.

9. *Pursuant to Section 41.02 (23), Wisconsin Statutes, the normal retirement date* under the *WRF* for persons employed in the protective occupations is defined as follows:

> " . . . normal retirement date of each protective occupation participant means the day on which such participant attains the age of 55 years, and after June 30, 1969, for purposes of s. 41.11 (6), normal retirement date for each protective occupation participant means the day on which such participant attains the age of 55 years."

10. Under the *WRF*, compulsory retirement is defined in Section 41.11 (1), Wisconsin Statutes, as follows:

> "(1) compulsory retirement. Any participating employee, except an officer elected by the vote of the people, who has reached his normal retirement date on the effective date for his employer shall be retired at the end of his first calendar quarter year as a participating employee and any participating employee, except an officer elected by the vote of the people, who reaches his normal retirement date shall be retired at the end of the calendar quarter year in which such date occurs, unless, in either case, his employment is continued by his employer or appointing authority."

11. During the period from January 1, 1977, to November 19, 1979, there were twenty (20) Fire Department active employees covered by the *s. 62.13 Fund.*

12. During the period from January 1, 1977 to November 19, 1979, there were one-hundred twenty-five (125) Fire Department active employees covered by the *WRF*.

13. Prior to passage of Ordinance No. 19-56, passed on July 2, 1956, *WRF* protective occupation employees retired at the age of sixty-five (65) pursuant to 66.906(1), Wisconsin Statutes. Ordinance No. 19-56 adopted this mandatory retirement age for all city employees. In 1967 the Wisconsin Legislature, through Chapter 355 Laws of 1967, amended Section 66.901, Wisconsin Statutes to provide that after January 30, 1974 the normal and conditional retirement age for each protective occupation participant would be fifty-five (55) unless the municipality or local government had exercised its authority to extend the retirement age beyond fifty-five (55) pursuant to Wisconsin Statutes Section 41.11(1) or its predecessor Wisconsin Statutes Section 66.906(b). Ordinance No. 39-74, passed May 7, 1974, reduced said mandatory retirement age for *WRF* protective occupation employees to sixty (60). Said reduction in the age for mandatory retirement was done as a result of lobbying by union officials and the younger employees affected by the retirement age seeking a reduced retirement age. The older employees, however, opposed this reduction in the retirement age. One of the purposes of said change was to provide greater promotional opportunities for firefighters by creating a greater turnover in older personnel who generally hold the higher ranking positions. Ordinance No. 107-78, passed December 19, 1978, placed a moratorium on mandatory retirement at age sixty (60) until February 1, 1980.

14. On May 26, 1967, the *KFPB* passed a Resolution "that all Firemen Personnel of the City of Kenosha, State of Wisconsin, exclusive of the Fire Chief, subject to pension under Section 62.13, Wisconsin Statutes, shall be retired on the birthdate on which the age of 65 years is attained". At its March 8, 1973 meeting, the *KFPB* took notice of a

decision by the Hon. William E. Crane, Winnebago County Circuit Judge, dated October 2, 1972, Case No. 38438, entitled *Frank Blechl, et al. v. Police Pension Board of the City of Oshkosh*, holding that a Section 62.13 Pension Board cannot set a uniform date for mandatory retirement, but . . . "in determining involuntary retirement of an officer pursuant to the defendant Police Pension Board's own motion, it will be necessary for said Board to afford each officer individually a hearing with the minimum rudiments of due process, and a finding that any such retirement is in the interests of efficiency of service and for the public good". The *KFPB*, however, took no action to rescind its mandatory retirement age of 65.

15. After March 8, 1973, the *KFPB* never retired anyone against their will as said Board always acted on a written request from an employee for a pension.

16. John F. Desris and Leo F. Konrad received satisfactory or higher job performance ratings while employed with the City of Kenosha Fire Department.

17. On May 21, 1974, the *KFPB* defeated by a three to four vote, a Resolution "that all firemen personnel of the City of Kenosha, State of Wisconsin, subject to pension under Section 62.13 Wisconsin Statutes, shall be retired on the birth date on which the age of 60 years is attained—to take effect February 1, 1975". The then Mayor, Wallace Burkee, voted to deny said Resolution. The Board acted upon a letter from the Kenosha Professional Fire Fighters Union stating that the firefighters under the s. 62.13 pension system wished to have the Pension Board elect to have age sixty (60) as the retirement age for all s. 62.13 members. Previously, on March 31, 1972, the Board failed to pass a Resolution reducing the retirement age of *s. 62.13 Fund* personnel to age fifty-five (55). A similar Resolution before the Board on June 30, 1972 also did not pass as it failed to receive a second to the motion to adopt.

18. The *FKPB* was a City Board possessing the powers and duties conferred upon it by Section 62.13, Wisconsin Statutes. The membership of said Board, pursuant to said statute, consisted of the Mayor, Fire Chief, City Clerk, Comptroller and three (3) firefighters.

19. There have been firemen over the age of sixty (60) years who were members of the *s. 62.13 Fund* who have been employed by the City of Kenosha from May 1, 1974 to the present.

20. Plaintiffs John Desris and Leo Konrad were forced to retire on January 2, 1977 solely because Kenosha Ordinance No. 39-74, which required the retirement of all firemen governed by the *WRF* upon reaching sixty (60) years of age and having 25½ years of service. Plaintiffs were not retired based upon any physical or psychological tests or evaluations which indicated that they were personally unfit to continue in the employment of the City. The City made no attempt to find less demanding work for Plaintiffs nor did Plaintiffs request that the City provide them will less demanding work as a substitute for mandatory retirement.

21. The Mayor of the City of Kenosha, Wisconsin had, at all times herein relevant, power to veto ordinances of the City of Kenosha, subject to the provisions therefor within State law, and subject to the power of the Common Council to override said veto by a two-thirds vote of all the members of the Council.

22. The then Mayor, Wallace Burkee, did not veto Ordinance No. 39-74 following its passage, which ordinance lowered the mandatory retirement age for firemen under the *WRF* from sixty-five (65) to sixty (60).

23. The City of Kenosha does not claim ignorance of the requirements of the provisions or amendments to the Federal Age Discrimination in Employment Law at all times relevant.

24. Since the retirement of the Plaintiffs, John F. Desris and Leo F. Konrad, no other City firefighter has been mandatorily compelled to retire, a major reason therefor being that the City does not desire to risk further litigation and potential awards of money damages until the law is clarified in this area. This is the reason why Ordinance No. 2-80 and subsequently Ordinance No. 84-80 postponed the effective date of Section 1.13 B., Ordinances, providing for mandatory retirement of City protective occupation employees at age sixty (60) until December 31, 1981.

25. City of Kenosha firefighters are not covered by Social Security by virtue of their City employment irrespective of which pension fund they are a member of. However, City of Kenosha firefighters could obtain Social Security benefits through other covered employment or through their spouses.

26. *WRF* members cannot obtain benefits, including Social Security, in excess of 80% of the average of their highest annual salaries for any three years of eligible employment. At approximately 35 years of employment *WRF* protective occupation employees will reach this 80% limitation. Once said employees reach that limitation, they can gain in fund benefits only through an increase in their base salary and not through a percentage increase based upon years of employment.

27. Generally, *WRF* protective occupation employees have the capacity to receive higher monthly annuities and their spouses to receive higher survivors monthly annuities than do *s. 62.13 Fund* employees.

28. *S. 62.13 Fund* employees receive 50% of their salary plus the value of certain fringe benefits at the level of their last month of employment as retirement benefits. This method of computing benefits did not change under Chapter 182, Laws of 1977, effective March 31, 1978 when the *s. 62.13*

Fund was merged for administrative purposes only into the *WRF*. An increased number of years of service did not procure greater benefits for *s. 62.13 Fund* employees except as to the fact that any increases in base pay would be reflected in the amount of pension benefits. The *s. 62.13 Fund* provides that a member *may* retire with 22 years service at age fifty-five (55).

Respectfully submitted,

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BY: /s/ James W. Conway
JAMES W. CONWAY
Attorney for Defendants

EXHIBIT "A"

PROOF OF PUBLICATION

COPY OF NOTICE

ORDINANCE No. 39-74
By: The Mayor

Amending Section 1.13 of the Code of General Ordinances—Compulsory Retirement at 65.

The Common Council of the City of Kenosha, Wisconsin, do ordain as follows:

Section One: That Section 1.13 of the Code of General Ordinances of the City of Kenosha, Wisconsin, be, and the same hereby is, amended by striking from the title thereof the following: "At 65". And by entitling the first paragraph thereof as follows: "A. City Employees—Non-Protective Occupations."

Section Two: That Section 1.13 B, of the Code of General Ordinances of the City of Kenosha, Wisconsin, be, and the same hereby is, created to read as follows:

B. City Employees—Protective Occupations. Every person employed by the City in a protective occupation who is a participant in the Wisconsin Retirement Fund who reaches the 60th anniversary of his birth date, and has 25½ years of service, shall be retired on the January 2nd or July 2nd next following the anniversary of his birth date. The 25½ years of service provision shall apply only to those persons who were employed by the City of Kenosha at the time of passage and publication of this Ordinance."

Section Three: That this Ordinance shall be in full force and effect upon passage and publication.

Attest:
GAIL F. PROCARIONE.
City Clerk
Approved:
WALLACE E. BURKEE,
Mayor
Date: May 7, 1974
Passed: May 6, 1974
Published: May 9, 1974
(Order No. 56977)

May 9, 1974

COUNTY OF KENOSHA)
) ss.
STATE OF WISCONSIN)

Paul Roders, Mech. Supt. Being duly sworn, on oath says, that he is one of the printers of THE KENOSHA LABOR, a weekly newspaper printed and published in the City of Kenosha, County and State aforesaid, and that a notice, of which the annexed printed slip is a true copy, has been published in the said KENOSHA LABOR for the term of one weeks, once each week successively, commmencing the 9th day of May, A.D. 1974, and ending _____, A.D. 19____.

/s/ Paul Roders

SUBSCRIBED AND SWORN TO before me this 9th day of May, A.D. 1974.

No. of Lines 48

/s/ Verne O. Boyle
Notary Public,

Kenosha, Wis.

No. Insertions 1
Printer's Fee, $12.96 My Commission expires August 1975

EXHIBIT "B"

ORDINANCE NO. 107-78
By:The Mayor

To Repeal and Recreate Section 1.13 B. of the Code of General Ordinances - Retirement Age of City Employees in Protective Occupations.

The Common Council of the City of Kenosha, Wisconsin, do ordain as follows:

Section One: Section 1.13 B. of the Code of General Ordinances of the City of Kenosha, Wisconsin, is repealed and recreated as follows:

"B. Effective February 1, 1980, no City employee engaged in a protective occupation shall continue in City service upon reaching his or her sixtieth (60th) birthday for the reason that age is a bona fide occupational qualification for protective occupations and for the further reason that retirement at said age is mandated by the business necessity of insuring the establishment and maintenance of a workforce which is physically capable of performing in jobs designed to insure the public health, safety and welfare. City employees engaged in protective occupations are deemed to be those City employees whose principal duties involve active law enforcement or active fire suppression or prevention, including the Fire and Police Chief, and all administrative officers and supervisory personnel within the City Police and Fire Departments."

Section Two: This Ordinance shall become effective upon passage and publication.

Attest: /s/ Gail F. Procarione, City Clerk
Gail F. Procarione

Approved: /s/ Paul Saftig, Mayor
Paul Saftig

Date: Dec. 19, 1978

Passed: December 18, 1978
Published: December 21, 1978

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOHN F. DESRIS and
LEO F. KONRAD,
Plaintiffs,

v.

Civil Action
No. 78-C-832

THE CITY OF KENOSHA, WISCONSIN; CASIMIR J. MIECHOWICZ; ELMER J. ROGAN; ROBERT V. BAKER; WILLIAM S. POCAN; DONALD ANDREOLI; PETER P. NEDWESKI; GEORGE R. FITCHETT; EARLE G. SCOVILLE; JESSE KOLMOS; FRANK J. BENNETT; JOHN D. BILOTTI; JOHN R. MADISON, JR.; DONALD S. LAMBRECHT; MICHAEL BALTES; ALBERT FRANK; ALVIN G. HOFFMAN; GERALD F. BELLOW; PAUL W. SAFTIG; PETER J. ZEIHEN; ALFRED W. ANDREUCCI; WILLIAM H. BORKHOLZ; ROBERT C. BOETTCHER; RONALD E. BROESCH; RONALD L. JOHNSON; STEPHEN M. JUDELLA; MICHAEL J. STANCATO; MEMBERS OF THE COMMON COUNCIL OF THE CITY OF KENOSHA, WISCONSIN; and WALLACE E. BURKEE- Mayor of the City of Kenosha, State of Wisconsin.

Defendants.

ORDER

A status conference was held in the action on Monday, March 31, 1980. Attorney Stephen Jones of Little Rock,

Arkansas appeared for the plaintiffs and James Conway, Kenosha City Attorney, appeared for the defendants. Counsel disclosed to my law clerk, Dan O'Brien, their agreed plan for the resolution of this case in the coming months.

Based upon the discussions with counsel, I make the following Order.

IT IS ORDERED THAT:

All motions for summary judgment shall be submitted by August 18, 1980. The stipulated facts shall be submitted on or before that date.

The responsive briefs shall be submitted on or before September 30, 1980.

Any reply briefs shall be submitted on or before October 15, 1980.

There will be a status conference call (initiated by the court) on Thursday, October 16, 1980, at 8:45 A.M.

Dated at Milwaukee, Wisconsin, this 1 day of April, 1980.

BY THE COURT:

/s/ Terence Evans
TERENCE T. EVANS
United States District Judge

APPENDIX G

WISCONSIN STATUTES 1975

SUBCHAPTER I

WISCONSIN RETIREMENT FUND

* * *

41.02 Definitions.

* * *

(11) (a) "Protective occupation participant" means any participant whose principal duties involve active law enforcement or active fire suppression or prevention, provided such duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning.

* * *

(23) "Normal retirement date" means the day on which a participant attains the age of a) 60 years if he is or was a protective occupation participant; b) 62 years if he is or was a supreme court justice, circuit judge, county judge, member of the legislature, state constitutional officer elected by vote of the people, or a Group D participant who is or was a county or municipal officer elected by vote of the people; or c) 65 years otherwise; but after June 30, 1974, normal retirement date for each protective occupation participant means the day on which such participant attains the age of 55 years, and after June 30, 1969, for purposes of s. 41.11 (6), normal retirement date for each protective occupation participant means the day on which such participant attains the age of 55 years.

* * *

41.11 Compulsory retirement; annuities.

(1) COMPULSORY RETIREMENT. Any participating employe, except an officer elected by the vote of

the people, who has reached his normal retirement date on the effective date of his employer shall be retired at the end of his first calendar quarter year as a participating employe and any participating employe, except an officer elected by the vote of the people, who reaches his normal retirement date shall be retired at the end of the calendar quarter year in which such date occurs, unless, in either case, his employment is continued by his employer or appointing authority.

WISCONSIN STATUTES 1975

62.13 Police and fire departments

* * *

(9) Police pension fund.

* * *

(b) *Board of trustees.* 1. The mayor, treasurer, comptroller, and the chief and three active subordinates of the department, shall be the board of trustees of the said pension fund. The three subordinates from the department shall be elected annually, by ballot, at least three days before the annual election of officers of the board. Each subordinate of the department shall be entitled to vote for such three members of the board upon one ballot, and the three persons receiving the highest number of votes shall be elected. The members of the board shall receive no compensation for service threon.

2. The board shall meet at least once annually in January and select from its members a president and a secretary, and shall fill vacancies in such offices. The city treasurer shall be ex officio treasurer of such board, and as such, custodian of the fund and all securities and property belonging thereto. He shall keep books of account thereof in such manner as the board shall direct. Such books shall always be open to inspection by the board or a member thereof. The city treasurer shall

be liable on his official bond for the performance of such duties.

3. The board shall have exclusive control and management of the fund. The moneys therein shall be paid out only upon warrant signed by the president and countersigned by the secretary of the board. No such warrant shall be drawn except upon order of the board duly recorded in its proceedings. The board may invest the fund or a part thereof in the name of the board in such securities as are authorized by Chapter 320 for investment of trust funds, or in any bonds or securities issued under the authority of any municipality, whether the same create a general municipal liability or a liability of the property owners of such municipality for special improvement made therein and may sell such securities.

4. The board shall hear and decide all applications for pensions, and shall have power to compel witnesses to attend and testify before the board thereon and upon all matters connected with the fund, in the same manner as provided by law for taking testimony before notaries public. Any member of the board may administer oaths to such witnesses.

5. The board shall make the needful rules for its government, the conduct of its proceedings, and the management of the fund. It shall cause its secretary to keep a record of all its proceedings. It may appoint a clerk, and provide for the payment from the fund of clerk hire, printing, and other necessary incidental expenses.

(c) *Pensions.*

* * *

3. Service. A member of the department who has served 22 years or more may apply to be retired or may be retired on motion of the board, except that a member joining the police department after January 1, 1940, must also have attained the age of 55 years. Upon such retirement, or upon discharge after such service, the

board shall order to be paid him a monthly pension equal to one-half his monthly compensation at such time provided, however, that in the event that such member received an increase in his compensation in the year preceding his retirement, which said increase was granted for the purpose of increasing his pension, such increase in compensation shall be disregarded in computing the amount of his pension, and provided further that in the event that a member has been promoted in rank within the year preceding his retirement and said promotion results in an increase in his compensation, his pension shall be computed on the basis of the current compensation for the position from which he was promoted.

* * *

(10) Firemen's pension fund. (a) Each city of the second and third class having a paid fire department shall have a firemen's pension fund.

* * *

(e) The provisions of paragraphs (b) to (d) of subsection (9) shall apply to the firemen's pension fund, except that a member joining the fire department after July 1, 1917, and before January 1, 1940 shall not voluntarily retire after 22 years of service and be entitled to a pension, unless he shall also have attained the age of 52 years, and except, if any member of the department while contributing to the fund, shall sustain injury while not on duty, and be found upon examination by a medical officer, if any be ordered by the board, or by a licensed physician ordered by the board, to be permanently disabled, physically or mentally by reason thereof, so as to render necessary his retirement from service in such department, the board shall retire him and order payment to him monthly of a sum equal to 10 per cent of his monthly compensation at the date of his retirement if such disability occurs at any time after the completion of 6 years of service, and an additional amount equal to 2½ per cent of the monthly compensa-

tion for each additional year of service over said 6 years service, but at no time shall the total monthly pension exceed the sum of 50 per cent of his monthly compensation excepting that no pension shall be paid where the disability or disease herein results from gross negligence or wilful misconduct.

(f) No person who, prior to January 1, 1948, had not contributed to a firemen's pension fund established pursuant to this subsection shall be permitted to contribute to such fund or become a member thereof on or after such date; nor shall he or his widow, child or dependent parent be, or become, entitled to receive any benefit from such fund. Any person who, after December 31, 1947, becomes a member of the fire department in a city of the second or third class, or who was a member of such department on said date, but who, in each such case had not, on or before such date, properly contributed to a firemen's pension fund established pursuant to this subsection, and who can otherwise qualify, shall be, or become, a participating employe under sections 66.90 to 66.918.

ORDINANCE NO. 19 (1956)

COMPULSORY RETIREMENT AT 65

The Council of the City of Kenosha, Wisconsin does ordain as follows:

Section One: That Chapter 1 of the Code of General Ordinances be and the same hereby is amended by adding thereto the following:

1.13 Compulsory Retirement at 65. Effective January 1, 1957 no officer or employee, who is subject to the Wisconsin Retirement Fund Sections 66.90 to 66.918 of the Wisconsin Statutes, shall be continued in his office or employment after attaining the age of 65 years. It is the intention of this section to establish the policy that the Council will not grant or

approve the extension in office or employment of any person who is or thereafter attains the age of 65 years on or after January 1, 1957.

Section Two: This ordinance shall be in full force and effect from and after its passage and publication.

EDWARD C. FECHNER.
President of Council.

Attest: J.E. SAWICKI
Clerk of Council.

Passed: July 2, 1956
Published: July 5, 1956.

ORDINANCE NO. 39-74
By: The Mayor

Amending Section 1.13 of the Code of General Ordinances—Compulsory Retirement at 65.

The Common Council of the City of Kenosha, Wisconsin, do ordain as follows:

Section One: That Section 1.13 of the Code of General Ordinances of the City of Kenosha, Wisconsin, be, and the same hereby is, amended by striking from the title thereof the following: "At 65". And by entitling the first paragraph thereof as follows: "A. City Employees—Non-Protective Occupations".

Section Two: That Section 1.13 B. of the Code of General Ordinances of the City of Kenosha, Wisconsin, be, and the same hereby is, created to read as follows:

"B. City Employees—Protective Occupations. Every person employed by the City in a protective occupation who is a participant in the Wisconsin Retirement Fund who reaches the 60th anniversary of his birth date, and has 25½ years of service, shall be

retired on the January 2nd or the July 2nd next following the anniversary of his birth date. The 25½ years of service provision shall apply only to those persons who were employed by the Cityof Kenosha at the time of passage and publication of this Ordinance."

Section Three: That this Ordinance shall be in full force and effect upon passage and publication.

Attest: /s/ Gail Procarione, City Clerk
Gail F. Procarione

Approved: /s/ Wallace Burkee, Mayor
Wallace E. Burkee Date: May 7, 1974

Passed: May 6, 1974
Published: May 9, 1974

Regular Meeting of the Board of Trustees
of the Firemen's Pension Fund
of the City of Kenosha, Wisconsin
May 26, 1967

Minutes of a meeting of the Firemen's Pension Fund Board — held on May 26, 1967 at 9:30 A.M.

The meeting was called to order by Joseph R. Sawicki, Secretary.

Present: Jerome Gumbinger, Fire Chief; Firemen Frank Blasi, W. Schultz, E. Zak and Joseph R. Sawicki, Secretary.

In attendance: Mayor Wallace E. Burkee.

The first order of business was to elect a President of the Board.

It was moved by Fireman Blasi, seconded by Fireman Schultz to nominate Mayor Burkee—and it was moved and

seconded to close the nominations and have the Secretary cast a unanimous ballot for Mayor Burkee as President of the Fire Pension Board. Motion carried.

It was moved by Fireman Blasi, seconded by Fireman Schultz to approve the minutes of the meeting held February 7, 1967, as printed.
Motion carried.

A letter from John A. Smith, Assistant Fire Chief, was read —requesting retirement from the Kenosha Fire Department effective as of June 30, 1967, having served with the Fire Department since July 1, 1928.

On a motion by Fireman Schultz, seconded by Fireman Zak, the request was granted and John Smith retired on pension as of June 30, 1967—and the Treasurer of the Firemen's Pension Fund instructed to pay to John A. Smith, in accordance with Chapter 62.13 of the Statutes, a pension in the amount of $444 per month, same being equal to one-half of his monthly compensation at the time of retirement on pension effective June 30, 1967.
Motion carried.

There was a discussion regarding the adoption of a uniform retirement policy, such as that adopted by the Police Pension Fund Board.

It was moved by Chief Gumbinger, seconded by Fireman Blasi to adopt the following resolution:

RESOLUTION OF FIREMEN'S PENSION BOARD
CITY OF KENOSHA, STATE OF WISCONSIN

WHEREAS, Section 66.906 (C), Wisconsin Statutes, provides for compulsory retirement of Firemen at age 60 years, and

WHEREAS, Section 66.906 (C), was enacted after extensive study by the Retirement Research Council and a report by said Council recommending the adoption of said section, and

WHEREAS, Section 1.13 of the Code of General Ordinances of the City of Kenosha establishes a consistent policy of retirement of the age of 65 years for all City Employees under the Common Council's jurisdiction, and

WHEREAS, the Firemen's Pension Board of the City of Kenosha considers it desireable to maintain a consistent policy for all Firemen in the City of Kenosha, State of Wisconsin, and to adhere to the standards that have been established by the Wisconsin State Legislature, NOW, THEREFORE,

BE IT RESOLVED, that all Firemen Personnel of the City of Kenosha, State of Wisconsin, exclusive of the Fire Chief, subject to pension under Section 62.13 Wisconsin Statutes, shall be retired on the birthdate on which the age of 65 years is attained.

Adopted this 26th day of May, 1967.

Attest: /s/ Joseph R. Sawicki
Joseph R. Sawicki
Secretary

Approved: Wallace E. Burkee
President

Motion carried.

It was moved by Fireman Schultz, seconded by Fireman Zak to adopt the following: "That all Fire Department Employees who have already attained 65 years of age be retired at the person's next birthdate."
Motion carried.

There being no further business, it was moved by Fireman Schultz, seconded by Fireman Blasi to adjourn at 10:00 A.M. Motion carried.

Respectfully submitted,

/s/ Joseph R. Sawicki, Secretary

Meeting of the Board of Trustees of
the Firemen's Pension Fund
of the City of Kenosha,
May 21, 1974

Minutes of the Special meeting of the Firemen's Pension Fund Board held Tuesday, May 21, 1974.

The meeting was held in the Council Chambers of the Kenosha Municipal Building and called to order by Mayor Wallace E. Burkee, Chairman of the Board, at 4:30 P.M.

On roll call, the following members of the Board were present:

Mayor Wallace E. Burkee, Chairman
Fire Chief Frank E. Blasi
Firefighter K. Robinson
Firefighter J. Inele
Firefighter J. Gerlach
Mr. Dale Rudy, City Comptroller
Mr. Gail F. Procarione, Secretary

It was moved by Mr. Gerlach, seconded by Mr. Robinson to approve the minues of the regular meeng held January 17, 1974, as printed.
Motion carried unanimously.

Mayor Burkee presented a petition given to him, signed by approximately 48 firefighters, asking that no decision be made until some legislation is passed equalizing the pension

payments between pension systems under 62.13 and 66.90. (Exh. #1)

Mr. Gerlach submitted a letter from the Kenosha Professional Fire Fighters Union stating that the firefighters under the 62.13 pension system wish to have the Pension Board elect to have age 60 as the retirement age for all 62.13 members. (Exh. #2)

It is thereupon moved by Mr. Gerlach, seconded by Mr. Robinson that whereas, the Firemen's Pension Board of the City of Kenosha considers it desireable to maintain a consistent policy for all firemen in the City of Kenosha, State of Wisconsin, and to adhere to the standards that have been established by the Wisconsin State Legislature,

Now, therefore, be it resolved, that all firemen personnel of the City of Kenosha, State of Wisconsin, subject to pension under Section 62.13 Wisconsin Statutes, shall be retired on the birth date on which the age of 60 years is attained—to take effect February 1, 1975.

On roll call vote, the motion lost with the following members having voted: Aye: Robinson, Inele, Gerlach. Noes: Mayor Burkee, Chief Blasi, Mr. Rudy, Mr. Procarione.

There being no further business to come before the Board, it was thereupon moved by Chief Blasi, seconded by Mr. Inele to adjourn at 4:45 P.M.
Motion carried.

Respectfully submitted,

/s/ Gail F. Procarione
Gail F. Procarione, Secretary

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JOHN F. DESRIS AND LEO F. KONRAD	)	
PLAINTIFFS,	)	
VS.	)	File No. 78-C-832
THE CITY OF KENOSHA WISCONSIN, et al	)	
DEFENDANTS	)	

PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
ON EQUAL PROTECTION CLAIMS ARISING
UNDER FOURTEENTH AMENDMENT AND 42 U.S.C. §1983

HOUSE, HOLMES & JEWELL, P.A.
1550 Tower Building
Little Rock, Arkansas 72201
By: STEPHEN W. JONES & J. BRUCE CROSS
Phone: (501) 375-9151

C. *RETIREMENT AGE ACTUALLY FRUSTRATES THESE INTERESTS*

First, not only does such a distinction lack any substantial relation to any legitimate government interests, it actually serves to frustrate the interests articulated. Exempting the members of the 62.13 Plan from mandatory retirement at age 60 had the effect of retaining the oldest employees which meant that Kenosha acted to retain those individuals whose physical condition would be the most deteriorated due to age. For example, while no WRF firefighter was to reach age 60 until Mr. Desris did so on April 22, 1975, five members of the 62.13 Plan had or would have reached that age by the end of 1974—Joseph S. Badura

(60 on 6/8/74); Frank E. Blasi (60 on 12/8/74); Eldon C. Norton (64 on 9/16/74); Cyril Pontillo (61 on 3/6/74); Harold J. Stewblow (60 on 7/29/74) – and without voluntary retirement all could still be working today, as Joseph Badura apparently is at age 66. Further, with the exception of the Plaintiffs, no other WRF firefighter would have turned age 60 until Richard C. Heppel on July 25, 1979! (See Interrogatory No. 1, Exhibit No. 1 thereto). If the City were truly interested in eliminating those firefighters who were no longer physically able to perform their duties because of age, it certainly chose a strange way to accomplish that purpose.

The Defendants' actions were even more detrimental (if that's possible) to its stated purpose in lowering the WRF retirement age which was "to provide greater promotional opportunities for firefighters by creating a greater turnover in older personnel who generally *hold the higher ranking positions.*" (Stipulation No. 13; emphasis supplied). The assumption that age is related to career advancement is valid only to the extent that age is related to length of service since the latter is the more relevant factor in advancement. By retaining the 62.13 firefighters, who by law had to be hired before January 1, 1948, the City acted to retain those employees with the longest tenure since all other employees were hired after that date. (Stipulation Nos. 3 and 4). By doing so the logical assumption should have been that those in the higher ranking jobs would be retained, not removed. And this, in fact, is exactly what occurred.

In 1974 the Kenosha Fire Department effectively had sixteen (16) jobs which are ranked as follows:

1. Fire Chief
2. Assistant Fire Chief
3. House Captain
4. Superintendent of Instruction
5. Rescue Line Captain

6. Line Captain
7. Instructor
8. Mechanic
9. FPB Lieutenant
10. Rescue Lieutenant
11. Lieutenant
12. Chief Alarm Operator
13. Rescue Apparatus Operator
14. Apparatus Operator
15. Alarm Operator
16. Fire Fighter

A move from any one of these positions to a higher ranked position would represent a promotion in status and future promotional opportunities or in pay or in both.[2] If one assumes that the positions in the upper one-half of the list are the higher paying positions, i.e., mechanic or higher, a review of the firefighters employed on May 7, 1974 discloses that seventeen (17) of these positions were held by 62.13 firefighters while only two (2) were held by members of the WRF. (See Interrogatory No. 1 and Exhibit No. 1 thereto). Further, no member of the 62.13 Plan held a rank lower than Lieutenant. As a result, the City's reduction of the maximum age for WRF firefighters had virtually no impact on its stated purpose of eliminating those in the higher paying positions.

---

2 This list was compiled after a review of pages 2, 3, 8 and 9 of the 1978-1979 Labor Agreement between the City of Kenosha and Local 414, Kenosha Fire Fighters which was provided as Exhibit 26 in the Defendants' Answer to Interrogatories (relevant pages attached hereto as Exhibit 9) and of Exhibit 1 to Defendants' Answers to Interrogatories. In ordering the positions first consideration was given to the rate of pay. Where there was no rate of pay stated (as was the case for those positions not contained in the bargaining unit) or where rates of pay were the same, the rank was determined by the normal promotional history of individuals holding the positions in question as found in Exhibit 1 to Defendants' Answer to Interrogatories.

But the complete lack of relationship between the classification adopted and the stated purpose is nowhere better illustrated than by comparing the number of promotions that could have been created by reducing the WRF maximum age to 60 with the number that could have been created by reducing the 62.13 maximum age to 60. Before beginning such an analysis, however, one must first recognize, as the Supreme Court did in *Vance v. Bradley, supra*, that " . . . those who have reached age 60 are likely to have achieved the top ranks of the service, and their departures usually will have a domino effect creating opportunities at each lower level." 440 U.S. at 102 n. 20. This is nothing more than a recognition that vacancies in a position are normally filled by someone in the next lower position. The Fire Chief, for example, would not be replaced by a Fire Fighter, but by an Assistant Fire Chief. Applying this principle to the Kenosha Fire Department, the departure of the Fire Chief would create fifteen (15) promotions, an Assistant Fire Chief fourteen (14), a House Captain thirteen (13) and so on down the line.

When one analyzes the position held and the sixtieth birthdate of the firefighters in service in 1974, the results are startling indeed. Such an analysis discloses that in the first five years of operation (May 7, 1974 to May 7, 1979), the mandatory retirement age of 60 compelled the retirement of only two (2) WRF firefighters, the Plaintiffs Mr. Desris and Mr. Konrad, whose removal as an Apparatus Operator and Lieutenant could have created a maximum of seven (7) promotions. On the other hand the application of the same retirement age to members of the 62.13 Plan could have created 102 promotions. (See Exhibit 10 attached hereto).

To say that the retirement ages chosen have no fair, substantial or significant relation to a legitimate interest is an understatement of the highest order. Retiring WRF firemen at 60 while retaining 62.13 Plan members until age 65 is analogous to leaving fire trucks and other modern equipment at the station house and fighting a fire with a

bucket brigade. It simply defies the most rudimentary dictates of logic and common sense.

EXHIBIT 10

A review of Defendant's answer to Interrogatory No. 1, Exhibit No. 1 attached thereto, discloses that the following individuals reached their sixtieth (60th) birthday before May 7, 1979, which represents the first five years of the operation of Ordinance No. 39-74 (i.e., May 7, 1974 to May 7, 1979).

62.13 Plan

Last Name	*Position as of May 7, 1974*	*Date of 60th Birthday*	*Promotions Created by Retirement*
Badura	Lieutenant	6/8/74	5
Blasi	Fire Chief	12/8/74	15
Koessl	Lieutenant	4/18/78	5
Miksis	FPB Lieutenant	4/28/79	7
Norton	Lieutenant	9/15/70	5
Pontillo	House Captain	3/06/73	12
Quilici	House Captain	4/16/77	12
Ritacca	House Captain	4/29/75	12
Streblow	Assistant Fire Chief	7/29/74	14
Slytkowski	Line Captain	11/17/78	10
Wolney	Lieutenant	2/20/75	5
TOTAL PROMOTIONS POSSIBLE WITH RETIREMENT OF 62.13 MEMBERS AT AGE 60.			102

WRF

Name	*Position as of May 7, 1974*	*Date of 60th Birthday*	*Promotions Created by Retirement*
John Desris	Apparatus Operator	4/22/75*	2
Leo Konrad	Lieutenant	2/20/76*	5
TOTAL PROMOTIONS POSSIBLE WITH RETIREMENT OF WRF MEMBERS AT AGE 60.			7

*While all 62.13 Plan members would have had over 26 years service on their 60th birthday, Plaintiffs did not obtain the minimum 25½ year service until they reached age 62 and 61 respectively in 1976 and were, therefore, not forced to retire until January 1, 1977.

Office-Supreme Court, U.S.
FILED
MAY 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1752

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

JOHN F. DESRIS and LEO F. KONRAD,
Petitioners,

v.

THE CITY OF KENOSHA, WISCONSIN, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES W. CONWAY,
City Attorney,
Rm. #201,
625 - 52nd Street,
Kenosha, WI 53140,
(414) 656-8061,
Counsel for Respondents.

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REASONS FOR DENYING THE WRIT

I. "RATIONAL BASIS" - REVIEW INAPPROPRIATE AND UNNECESSARY.

This case was effectively disposed of by the Seventh Circuit Court of Appeals when it ruled against Petitioners on one fundamental issue, to-wit:

> "Are the plaintiffs, as members of the WRF pension plan, similarly situated with firefighters governed by the sec. 62.13 pension plan and thus entitled to equal protection of the law?"

The Seventh Circuit Court of Appeals stated in this regard:

> "Our determination that, for the purpose of a claim based on the Equal Protection clause, the plaintiffs are not similarly situated with firefighters belonging to the sec. 62.13 pension plan makes it unnecessary for us to determine whether a rational basis exists for retiring WRF pension plan members at age 60 and retiring sec. 62.13 pension plan members at age 65. However, were it necessary to decide this issue we would determine that a rational basis does exist for this disparity in age of mandatory retirement."

Although the Respondents contend that the Seventh Circuit Court of Appeals did not error in any respect, Respondents suggest that review of said

court's determination of the "rational basis" issue is inappropriate and unnecessary as such determination is only dicta and as Petitioners could not recover in any event as they are not "similarly situated" with sec. 62.13 firefighters.

II. FOUNDATION FOR EQUAL PROTECTION, "SIMILARLY SITUATED" - REVIEW INAPPROPRIATE AND UNNECESSARY.

The required foundation for an equal protection cause of action is clear, consistent, unambiguous, long established, undisputed and not in need of clarification by this court. As early as 1887, this court held, in Hayes v. Missouri, 120 U.S. 68, 30 L.Ed. 578, 7 Sup.Ct. Rep. 350, at 580 of L.Ed.:

> "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances, and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the Fourteenth Amendment: "Class legislation discrimination against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects

> alike all persons similarly situated, is not within the Amendment." 113 U.S. 27, 32 (28: 923,925). (emphasis supplied)

The required foundation for an equal protection cause of action, a foundation herein lacking, is summarized in American Juris Prudence:

> "It has been repeatedly said that the guaranty of the equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances,...". (emphasis supplied) 16A Am Jur 2d, sec. 737, at 774.

> "Equal protection in its guaranty of like treatment to all similarly situated permits classification which is reasonable and not arbitrary and which is based upon material and substantial differences having a reasonable relation to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved. The equal protection clause does not forbid discrimination with respect to things that are different. The test is whether the difference in treatment is an invidious discrimination,...". 16A Am Jur 2d, sec. 738, at 776-777.

> "The Constitution does not require situations which are different in fact or opinion to be treated in law as though they were the same." 16A Am Jur 2d, sec. 746, at 807.

> "Classification is an inherent right and power of the legislature, and the

> constitutional guaranty of equal protection does not dispense with all classifications. A differentiation is not necessarily a discrimination. And since the very idea of classification is inequality, inequality in no manner determines the question of constitutionality." 16A Am Jur 2d, sec. 747, at 802.
>
> "The legislative power to classify includes the power to sub-classify within reason." 16A Am Jur 2d, sec. 747, at 806.
>
> "...the difference between the subjects of a legislative classification need not be great, and if any reasonable distinction between the subjects as a basis for the classification can be found, the classification should be sustained; a 'narrow' distinction will suffice." 16A Am Jur 2d, sec. 754, at 841.

A recent pronouncement of this court, U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 66 L.Ed. 2d 368, 101 S.Ct. 453 (1980), at 378-379 L.Ed., provides us with the clearest explanation to date of what the courts are to look for in examining legislative pronouncements challenged on equal protection grounds:

> "Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," Flemming v. Nestor, 363 U.S., at 612, 4 L.Ed. 2d

> 1435, 80 S.Ct. 1367, because this court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line drawing. The "task of classifying persons for...benefits...inevitably requires that some persons who have an almost equally strong claim to favorite treatment be placed on different sides of the line." Mathews v. Diaz, 426 U.S. 67, 83-84, 48 L.Ed. 2d 478, 96 S.Ct. 1883 (1970), and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration."

Petitioners erroneously argued before the trial court that the appropriate classification of City firefighters is "all City of Kenosha firefighters", assuming sub-classes thereof to be invidious discrimination. There are, however, in reality, two logical classes of firefighters, each being distinguishable from the other; namely, firefighters subject to the retirement provisions of Chapter 41 (WRF) and firefighters subject to the retirement provisions of sec. 62.13, Wisconsin Statutes.

Under Chapter 41, the State set age fifty-five (55) as the mandatory retirement age, but gave the City the option of extending that age

[Stip., paras. 3,9 and 10-Petitioners' Appendix E]. It is not disputed that the City, by Ordinance, could provide for the mandatory retirement of its WRF firefighters.

Under sec. 62.13, the sec. 62.13 Board, which is also empowered to act by virtue of State law, determined the retirement of firefighters who were members of said plan [Stip., paras. 3,4,6,14,15,17 and 18-Petitioners' Appendix E]. Said Board retired its members on the basis of a general age 65 policy. However, there is legal authority to the effect that retirements mandated by said Board should have been processed on a case by case basis following a due process hearing [Stip., para. 14-Petitioners' Appendix E].

It would, therefore, be erroneous to conclude that there is only one class of firefighters entirely under the control of the Respondents. Please note that it is not unusual for mandatory retirement ages to be established through pension plans. Congress recognized the fact that pension plans determine retirement

ages in the 1967 version of the Age Discrimination in Employment Act, 29 U.S.C. sec. 631, Pub. L. 90-202, 512, Dec. 15, 1967, 81 Stat. 607, which contained the following exception thereto:

> "Sec. 4(f). It shall not be unlawful for an employer...(2) To observe the terms of...any bona fide employee benefit plan such as a retirement, pension or insurance plan which is not a subterfuge to evade the purposes of this chapter,...".

The WRF treated its members equally. The sec. 62.13 Board treated its members equally. Equal treatment within said individual plans is not disputed.

Under State law, at all times relevant, the Chapter 41 (WRF) and sec. 62.13 pension plans were autonomous. There is no authority to the effect that one such independent and autonomous body has a duty to adopt the position of another independent and autonomous body. The WRF had no duty to adopt the mandatory retirement policy of the sec. 62.13 Board and vice versa since both pension plans derived their authority to retire their members from State law. The City Common

Council had no duty to establish a mandatory retirement age for its WRF employees which was consistent with the mandatory retirement policies of the sec. 62.13 Board. Under State law, neither pension board is subordinate to the other. For any court to hold that the Common Council, with respect to WRF firefighters, had a duty to adopt the retirement policy of the sec. 62.13 Board would especially make very little sense if a correct interpretation of the duty of the sec. 62.13 Board leads to the conclusion that it must retire its members on a case by case basis following a due process hearing as there have never been any similar legal contentions with respect to the WRF [Stip., para. 14-Petitioners' Appendix E]. The retirement procedures of the sec. 62.13 Board were never a relevant issue in this case since Petitioners were WRF firefighters.

There is case law directly on point supporting Respondents' position. The 9th Circuit, in Martin v. Tamaki, 607 F.2d 307, 310 (1979) held that equal protection does not apply where

differences in pension plans are founded upon two autonomous bodies administering their respective pension plans. The Montana Supreme Court held, in Billings Associated Plumbing, Heating and Cooling Contractors v. State Board of Plumbers, 602 P 2d 597 (1979), that dual regulation is not unconstitutional and that whenever there is dual regulation there will, of necessity, be uneven treatment. The Wisconsin Supreme Court's decision in Bence v. Milwaukee, 107 Wis. 2d 469, 318 N.W. 2d 918 (1982), held that harmonious labor relations and the provision of pension benefits are a valid public purpose (at 484) and that (at 486) "A classification based upon whether an employe was employed on the date that the collective bargaining agreement was executed is a substantial distinction." The instant case is similar in that the date of employment determines to which pension plan an employe belongs. Once an employe is in a plan, the plan itself dictates the level of benefits. Bence held that there was a rational basis for an ordinance which incorporated

provisions governing pensions arrived at through a collective bargaining agreement even though greater pension benefits were provided to employes who retired after a certain date than were accorded employes who retired prior to that date. This issue is similar to the instant case. In the instant case, the date of hire determines the pension plan to which an employe will belong.

The instant case involves only an application of existing law to the specific facts of this case. This court, in the constitutional law field, would not clarify the law or resolve any conflicts among the circuits if it reviewed this matter. Even if there was an error by the Seventh Circuit, which is denied, the Petition should be denied as this court has taken the position that its limited resources are to be utilized to set policy and not to routinely correct Appellate Court errors.

III. VALID PUBLIC PURPOSE - NO VIOLATION.

Petitioners, at 12-15 of their Petition, contend that "...the critical issue is whether

reducing the WRF mandatory retirement age from 65 to 60 rationally furthered any legitimate state purpose". This contention was not expressed by Petitioners as an issue before the Appellate Court prior to a Petition for a rehearing. Petitioners' main brief submitted to the Court of Appeals, at 19, stated:

> "The issue before the court is whether the actions of the Defendants in establishing a mandatory retirement age of 60 for one group of its firefighters and of 65 for other firefighters is rationally related to a legitimate interest of the City."

Arguments on appeal centered on the disparity between retirement ages in the two pension plans, not on how those respective retirement ages were arrived at.

Assuming a legitimate public purpose has to be shown by Respondents, a legitimate public purpose has to be shown for retiring WRF employees at age 60. The Wisconsin Supreme Court, in Bence v. Milwaukee, 107 Wis. 2d 469, 318 N.W. 2d 918 (1982), held that harmonious labor relations and the provision of pension benefits are a valid public purpose. A legitimate public

purpose does not have to be shown by the City for reducting the WRF retirement age from 65 to 60. Further assuming that a legitimate purpose has to be shown for reducing the retirement age, Respondents can show such a legitimate purpose, to-wit:

1) To permit early retirement at full benefits to those employees who desire early retirement. Early retirement provides for the alternative benefits of either time off for relaxation or of time to change fields of employment, perhaps even going into business for oneself, while receiving a guaranteed income from a pension. Petitioners have already conceded that the paying of benefits is a legitimate state purpose. This purpose is not defeated, but rather enhanced by permitting early retirement and subsequent early payment of pension benefits.

2) The City will reduce its exposure to liability for heart and lung disease benefits provided for under sec. 66.191 and sec. 40.65, Wisconsin Statutes, since age increases exposure.

Exposure to normal worker's compensation claims will also be reduced. Even if older employees may not necessarily be more prone to accidents, the impact of accidents that do occur is likely to be more severe. Judicial notice of the aging process will support said contentions.

3) Early retirement will increase promotional opportunities within the department and increased promotional opportunities, even if not immediately available, will spur morale and productivity.

If Petitioners' position were accepted by the courts, every city in the country would face bankruptcy through millions of dollars in lawsuits filed by employees who are members of one pension plan and who desire to procure some perceived benefit available only through a pension plan to which they are not members. At oral arguments, the Seventh Circuit Court of Appeals was quite concerned with the impact this case would have upon large cities having many diverse pension plans and retirement ages.

IV. "SIMILARLY SITUATED", A THRESHOLD QUESTION?

Petitioners contend that the "similarly situated" test is not a threshold question, but rather a part of the "rational basis" test itself. The answer to this question is not material and this question need not be answered, for if Petitioners' are not "similarly situated", they cannot prevail.

Petitioners' argument that there are no real and substantial distinctions between the WRF and sec. 62.13 pension plans flies in the face of a record which shows that there is no similarity whatsoever between said pension plans. They both have different retirement ages, different retirement benefits, different methods for computing benefits, different enabling state legislation, different local implementing legislation determining the actual retirement age, different governing bodies making policy decisions for and supervising the respective plans and different involvement of respective pension plan members in policy making (the sec. 62.13 Board included firefighters as voting members thereof, whereas WRF plan members had no

direct role in policy making and had input into policy only through lobbying).

V. OWEN AND MONELL - NO VIOLATION.

Petitioners contend that this court's decisions in Owen v. City of Independence, 445 U.S. 622, 63 L.Ed. 2d 673, 100 S.Ct. 1398 (1980) and Monell v. New York City Department of Social Services, 436 U.S. 658, 56 L.Ed. 2d 611, 98 S.Ct. 2018 (1978), if applied by the reviewing court, would alter the outcome of this action. This is not true as those cases are not applicable as they are not even remotely on point. The case at hand is an equal protection case. Owen is not an equal protection case, but is a case involving due process in the discharge of a public employee and it is also a case involving immunity defenses. Due process and immunity are not herein at issue. If immunity were an issue in the case at hand, it could only become an issue following a court's finding of a violation of the equal protection of the laws. Immunity is relevant only where there would otherwise be an award of damages. Since the Seventh

Circuit found no violation of equal protection, there is no potential for an award of damages and Owen is not relevant.

Petitioners' most unrealistic argument is one which was clearly rejected by the Court of Appeals; namely, that this court's decision in Monell compels a finding of liability because both pension plans depict the policy of the City. Monell created new law only in the area of immunities, not in the equal protection area. Monell does not make the City liable simply for having a custom or policy. For liability to attach to the City, the City's policy or custom must be constitutionally infirm. If there is no equal protection issue in the first instance or if there is such an issue, but the City has a rational basis for its policy or custom, then Monell is not applicable. The trial court erroneously relied upon Monell in holding the City liable. It appears that once the trial court found that the acts of the sec. 62.13 Board constituted a custom or policy of the City, its attention was diverted away from the true equal

protection issues. Monell has not deprived the City of any defenses previously available to it in the equal protection area.

Monell is being prematurely applied by Petitioners as it is applicable only when a court has first determined that an equal protection violation has occurred. At that point Monell is applied to determine whether or not the City should be liable for such a violation. Liability would attach only where the City was found to have a custom or policy and where more than a respondent superior theory was invoked as a bais for liability. Petitioners and the trial court misinterpreted Monell by construing said decision to impose liability whenever a City has a custom or policy, per se. This position is clearly erroneous as Monell, neither by express language nor by implication, is authority for a trier of fact to abrogate applying the traditional "similarly situated" and "rational basis" tests in equal protection cases.

VI. RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE - NO VIOLATION.

The Seventh Circuit Court of Appeals did not violate Rule 52(a) in reversing the trial court's decision and did not engage in an impermissible trial de novo for the following reasons:

A. Rule 52(a) Does Not Apply To Summary Judgment Cases.

Rule 52(a) states in part:

> "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule...56...".

Rule 56 covers summary judgment. This case was decided by the trial court under Rule 56. Therefore, as findings of fact are not necessary by a trial court in such cases, it is not relevant whether or not the Appellate Court disregarded any findings of fact made by the trial court.

B. The Pullman-Standard Case is Not Applicable.

Pullman-Standard v. Swint, 72 L.Ed. 2d 66, 102 S.Ct. 1781 (1982), cited on page 9 of the Petition is not relevant as that Title VII case involved "...a District Court's findings of fact, arrived at after a lenghty

trial..." (at 72 of L.Ed.).

The dissent of Justice Marshall therein is also not relevant for even if that case involved documentary evidence, documentary evidence may be the subject of dispute and such evidence, introduced at a lengthy trial, is not the equivalent of stipulated facts which form a basis for summary judgment.

The Pullman-Standard case, not being a summary judgment case, did not, by implication, reverse the Seventh Circuit's holding in Silverstein v. United States, 419 F.2d 999 (7th Cir. 1969), cert. den., 397 U.S. 1041 (1970), quoted on pages 9-10 of the Petition, a case which this court refused to review. The Silverstein case is still good law, holding that in a disposition of an action upon a motion for summary judgment, the "clearly erroneous" rules do not apply, since only questions of law are presented. Note that Rule 56(c) of the Federal Rules of Civil Procedure,

buy its very terms, permits summary judgment only where "...there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law".

C. There Are No Inferences From The Evidence.

Respondents deny that the instant case involves any inferences being drawn from the stipulated facts by any court. Therefore, the cases cited by Petitioners in this regard are not relevant.

D. Where Findings Do Not Rely Upon The Credibility Of Witnesses, The Force Of The Clearly Erroneous Doctrine Is Mitigated.

Rule 52(a) states in part:

> "...due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

The instant case was not only decided by summary judgment, but it was decided on stipulated facts which were part of the Appellate record. Although the stipulation was denoted a "partial stipulation of facts", it was for the purposes of summary judgment on the equal protection issue, the entire

factual record before the trial court.

Watkins v. Scott Paper Co., (1976, C.A. 5 Ala.) 530 F.2d 1159, cert. den. 429 U.S. 861, 50 L.Ed. 139, 97 S.Ct. 163, held in Footnote 17, at 1172:

> "F.R. Civ. P. 52(a) provides that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Where findings do not rely upon the credibility of witnesses, the force of the clearly erroneous doctrine is mitigated." (citations omitted)

E. Rule 52(a) Does Not Apply To Conclusions Of Law Or To Mixed Questions Of Law And Fact.

The Pullman-Standard case, cited by Petitioners, stated as to Rule 52(a) that the rule does not apply to conclusions of law, at 79 of L.Ed., and to some cases involving mixed questions of law and fact, at 80 of L.Ed.. Once the trial court found, "the plans are different, with each having its own individual characteristics", this finding was a sufficient basis for the trial court to conclude that Petitioners were not similarly situated.

The trial court noted the differences in

the pension plans, but found that those differences were not substantial. The determination of substantiality was a conclusion of law, which could be reversed on appeal. The rationale therefor is that facts relating to whether or not substantial distinctions exist are not provable in the usual sense, but are part and parcel of constitutional judgments which Appellate Courts must make. See Fortin v. Darlington Little League, Inc., (1975, CA 1) 514 F.2d 344, 348-349.

F. Findings Of Fact Of A Trial Court In Equal Protection Cases Are Not Binding On An Appellate Court In Applying The "Rational Basis" Test.

In equal protection cases findings as to a rational basis by a trial court have little weight on appeal. The reason for this is that a defense to an equal protection attack can be based upon "conceived facts". In McGowan v. Maryland, 366 U.S. 420, 426, 6 L.Ed. 2d 393, 399, 81 S.Ct. 1101, 1105 (1961) it was held that a court will not set aside a state's statutory classifica-

tion "if any state of facts reasonably may be conceived to justify it". In Barry v. Barchi, 443 U.S. 55, 61 L.Ed. 2d 365, 99 S.Ct. 2642 (1979), at 377 of L.Ed., this court held that the governmental defendant need not resort to "current empirical proof" to disprove bare allegations. In Vance v. Bradley, 440 U.S. 93, 59 L.Ed. 2d 171, 99 S.Ct. 939 (1979), this court held that in equal protection cases those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker. In Flemming v. Nestor, 363 U.S. at 612, 4 L.Ed. 2d 1435, 80 S.Ct. 1367, as quoted in U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 66 L.Ed. 2d 350, 378-379, 101 S.Ct. (1980), this court held that where there are plausible reasons for legislative action, the inquiry is at an end. "It is of course, constitu-

tionally irrelevant whether this reasoning in fact underlay the legislative decision." The Supreme Court has never insisted that a legislative body articulate its reasons for enacting a statute. From the above cases, it is readily apparent that in equal protection cases we are dealing with conceived facts rather than with empirical proof. An Appellate Court has just as much discretion in conceiving facts as does a trial court. Therefore, no matter what the law is in other cases, in equal protection cases, on appeal, findings of fact by a trial court are totally irrelevant on the "rational basis" issue.

G. The "Clearly Erroneous" Rule Does Not Apply Where Findings Of Ultimate Fact Are Affected By A Trial Court's Misapprehension Of The Law.

In the instant case, the clearly erroneous rule cannot be applied because the trial court misapprehended the law relative to the required foundation for an equal protection claim. See Ritter v. Morton (1975, CA 9, Idaho) 513 F.2d 942,

949 cert. den. 423 U.S. 947, 46 L.Ed. 2d 281, 96 S.Ct. 362, reh. den. 423 U.S. 1081, 47 L.Ed. 2d 91, 96 S.Ct. 869. See also: United States v. Texas Education Agency, Etc. (1977, CA 5 Tex) 564 F.2d 162, footnote 17, at 171-172, cert. den. 443 U.S. 915, 61 L.Ed. 2d 879, 99 S.Ct. 3106.

H. Rule 52(a) Was Not Violated When The Stipulated Facts Were Misquoted.

Petitioners, at 12-15 of their Petition, correctly state that the Appellate Court misquoted the facts. On page 3 of its decision, the Court of Appeals stated:

> "On May 7, 1974, the Kenosha Common Council, exercised this statutory authority by enacting Ordinance No. 39-74, extending the mandatory retirement age for WRF firefighters from age 55 to age 60." (emphasis supplied)

Paragraph 13 of the stipulation of facts stated:

> "Ordinance No. 39-74, passed May 7, 1974, reduced said mandatory retirement age for WRF protective occupation employees to sixty (60)." (emphasis supplied)

This discrepancy is obviously an inadvertent error in the writing of the decision

and is not intended to be a new finding of fact because this error is not material to the Appellate Court's reasoning underlying its decision on the merits. This discrepancy is not material as the basic fact that Ordinance 39-74 set the mandatory retirement age of WRF protective occupation employees at age 60 is consistent in both the Appellate Court's decision and the stipulation of facts. It is not material to the outcome of this litigation as to whether or not the retirement age was raised or lowered to arrive at an age 60 mandatory retirement for WRF protective occupation employees. The "similarly situated" and "rational basis" criteria were applied solely to the fact of age 60 being the mandatory retirement age for WRF protective occupation employees. How age 60 was arrived at is surplusage, said facts being relevant only for the purpose of providing the history of Ordinance 39-74.

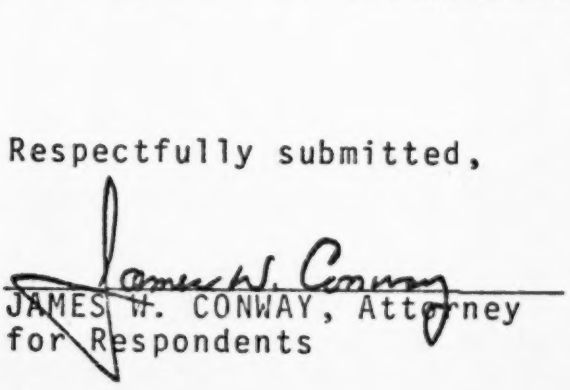
This argument is supported by the case

of United States v. Gorham, 536 F.2d 410, 175 U.S. App. D.C. 383 (1976) wherein the Appellate Court held that a factual statement referred to in a footnote of the Court of Appeal's original decision, which was claimed to have had no basis for support in the record, could not be used as a basis for granting a petition for rehearing where the statement was in no way related to the basis of the decision.

VII. CONCLUSION.

Respondents respectfully submit, for the reasons outlined above, that this court deny the petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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Dated: May 16, 1983